Supreme Court, U.S.
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No. 06-576

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In the Supreme Court of the United States

JES PROPERTIES, INC.
d/b/a CYPRESS TRAILS FARM,
a Florida corporation, and
MICHAEL W. GALLAGHER,

Plaintiffs,

vs.

USA EQUESTRIAN TRUST, INC., f/k/a USA EQUESTRIAN, INC. (formerly the American Horse Show Association), UNITED STATES EQUESTRIAN FEDERATION, INC., DAVE BURTON a/k/a DAVE BURTON, SR. a/k/a DAVE E. BURTON a/k/a DAVID E. BURTON, SR., BURTONS AND SONS, INC., DAVID BURTON a/k/a DAVID BURTON ,JR., a/k/a DAVID E. BURTON a/k/a DAVID E. BURTON, JR., LITTLEWOOD FENCES, INC., LTD., KERNAN HODGES a/k/a MRS. EUGENE R. MISCHE, STADIUM JUMPING, INC., THOMAS E. STRUZZIERI, HORSE SHOWS IN THE SUN, INC., LINDA S. ALDRICH, AND FOX LEA FARM, INC.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Eleventh Circuit may, in stated conflict with the decision of the United States Court of Appeals for the Second Circuit in *Billing v. Credit Suisse First Boston Ltd.*, 426 F.3d 130 (2d Cir. 2005), *cert. pending*, No. 05-1157, rule that a preclusive scheduling rule (the "Mileage Rule") which has conceded anti-competitive effects, adopted by a National Governing Body under the auspices of the Ted Stevens Olympic and Amateur Sports Act of 1978, 36 U.S.C. § 220501 *et seq.* (the "ASA"), is impliedly immune from all antitrust scrutiny under Section 1 of the Sherman Act, 15 U.S.C. § 1, without any examination or analysis of whether the Rule is necessary to effectuate Congress' intent in enacting the ASA.

2. Whether decisions of this Court, including *Silver v. New York Stock Exchange*, 373 U.S. 341, 83 S. Ct. 1246 (1963), *Gordon v. New York Stock Exchange*, 422 U.S. 659, 95 S. Ct. 2598 (1975), and *United States v. Nat'l Ass'n of Security Dealers*, 422 U.S. 694, 95 S. Ct. 2427 (1975), preclude the holding of the United States Court of Appeals for the Eleventh Circuit that any and all rules promulgated by an NGB under the ASA are impliedly exempt from antitrust scrutiny as a matter of law, no matter their admitted anti-competitive effects.

LIST OF PARTIES

The parties are listed in the caption.

CORPORATE DISCLOSURE

Petitioner JES Properties, Inc. d/b/a Cypress Trails Farms is a non-governmental corporation. Pursuant to Supreme Court Rule 29.6, Petitioner states that there is no parent corporation and no publicly held company owns 10% or more of the corporation's stock. Petitioner Michael W. Gallagher is an individual.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, JES Properties, Inc., d/b/a Cypress Trails Farm and Michael W. Gallagher, respectfully request that a Writ of Certiorari issue to review the decision and judgment of the United States Court of Appeals for the Eleventh Circuit entered on August 2, 2006. The Eleventh Circuit affirmed a decision of the United States District Court for the Middle District of Florida, which granted Defendants' motion for summary judgment.

OPINION BELOW

The opinion of the Eleventh Circuit is officially reported at *JES Properties, Inc. v. U.S.A. Equestrian, Inc.*, 458 F.3d 1224 (11th Cir. 2006). The District Court's order granting defendants' motion for summary judgment is not officially reported but is cited at 2006 WL 1126665 (M.D. Fla. 2005).

JURISDICTION OF THIS COURT

Judgment was entered by the Eleventh Circuit on August 2, 2006. This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioners filed their initial complaint in August, 2002, alleging claims under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, and Florida law. (R.1)[1] The complaint was subsequently amended, the third amendment having been filed in December, 2004. (R.258) The District Court granted summary judgment to all remaining defendants in May, 2005. (A.56) The Eleventh Circuit affirmed. (A.16)

The gravamen of Petitioners' complaint is a Sherman Act Section 1 challenge to the Mileage Rule, a restrictive scheduling rule governing the most important competitions for the key equestrian categories (hunter and

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[1] "R. indicates a reference to the Record before the Eleventh Circuit, including the district court document docket number, which may have subparts, plus page and paragraph numbers as appropriate, as in "R.317-14/7-8/15-16," indicating docket number 317, subpart 14, pages 7-8, paragraphs 15-16. "A." indicates a reference to the Appendix.

jumper). (Rule 214.7)[2] (R. 317-14/8/17; R.317-18/4-5/20) The Rule was enacted by defendant United States Equestrian Federation (the "USEF"), the National Governing Body (the "NGB") for equestrian sport designated by the United States Olympic Committee (the "USOC")[3] pursuant to the Ted Stevens Olympic and Amateur Sports Act of 1978, 36 U.S.C. § 220501 *et seq.* (the "ASA").

The USEF is a private membership organization made up of individuals, including persons who own and ride horses ("riders") and for-profit promoters who stage equestrian competitions ("horse shows"). The USEF rules allow it to designate certain horse shows as "Recognized Competitions." Recognized Competitions in the hunter and jumper categories are rated based upon the benefits conferred upon successful participating riders. Such benefits include the points a few highly successful jumper riders may earn towards selection for the United States Olympic Equestrian Team. (R.317-9/5-6; R.317-14/7-8/15; R.317-18/4/18)

The highest rated hunter and jumper Recognized Competitions are rated "A" or "AA" ("A-Rated Shows"). Promoters of A-Rated Shows may award the maximum amount of points to successful hunter competitors and prize money in excess of $10,000 to successful jumper competitors. (R.317-14/8/17; R.317-15/2-3/7; R.317-18/4-

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[2] A complete set of the relevant Rules as they existed prior to the 2005 amendments was lodged with the district court as an exhibit to R.288. These are cited as "Rule." A complete set of the relevant Rules as amended including Rules effective May 1, 2006 for the 2006 competition year is at R.344-2/1-8. These are cited as "Am. Rule."

[3] There are some 39 National Governing Bodies, one for each Olympic sport, according to the USOC's official website. *See* http://www.usolympicteam.com/19116_18922.htm.

5/20) Success in A-Rated Shows can also qualify riders for invitations to more prestigious national competitions. (R.317-9/5-6; R.317-14/8/17; R.317-18/4-5/20) While those few jumper riders who aspire to membership on the Olympic team typically compete in A-Rated Shows, most of the attendees at A-Rated Shows are riders whose primary goal is to improve the rankings of their horses to increase their value for resale or breeding or people who simply enjoy attending or competing in the shows. (R.317-9/5-6; R.317-14/7-8/15; R.317-18/4/18)

Both Petitioners and the non-USEF Defendants (the "Promoter Defendants") are for-profit promoters of horse shows, including A-Rated Shows. Because of its favorable climate, Florida is the site of most A-Rated Shows conducted in the United States during the Winter Season of December through March. (R.317-14/6/13; R.317-18/3-4/17) Promoters like the Promoter Defendants benefit economically from holding A-Rated Shows in several ways. Holding an A-Rated Show rather than a show with a lower rating enables promoters to charge the highest entrant and attendee fees, obtain the largest corporate sponsorship fees, and to sell ancillary services (such as horse stall rentals, bedding, feed, grooming supplies, and the sale of food and beverages to exhibitors and spectators) at the highest rates. Promoters also profit from developing real estate adjacent to horse show venues as residences for riders who desire to remain in Florida throughout the Winter Season. (R.317-9/7-8; R.317-14/8/16; R.317-18/4/19) Real estate near venues for A-Rated Shows is worth more than real estate near venues for lower rated shows. (R.317-9/7-8; R.317-14/8/16; R.317-18/4/19)

Under the USEF's Mileage Rule, promoters of A-Rated Shows who held shows in the previous year ("incumbent promoters") have a permanent veto power over the ability of other promoters to conduct competitive A-Rated Shows in subsequent years on the same date and within a 250-

mile radius of the incumbents' shows.[4] (Rule 214.7; R.317-14/8-9/18; R.317-18/5/21) Under other USEF rules, incumbent promoters also receive automatic renewals of their dates for A-Rated Shows in subsequent years as long as they seek renewal on a timely basis.[5] (Rule 212.1) However, incumbent promoters may, in their sole discretion, grant one-year Mileage Rule "waivers" to other promoters. (Rule 214.7) A Mileage Rule waiver permits a competing promoter to hold an A-Rated Show in a particular year within the 250-mile radius of exclusion at the same time as the incumbent's show, so long as the competitive show is no closer than 10 miles from the incumbent promoter's show. (Rule 214.7; R.317-14/8-9/18; R.317-18/5/21) Consequently, the incumbent promoters, not the NGB, determine who else may hold A-Rated Shows and when the shows may be held.[6]

The Promoter Defendants are incumbents who have, for decades, controlled each and every date for A-Rated Shows

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[4] As a result of earlier antitrust litigation, the Mileage Rule applicable in certain Northeastern States prohibits competition only within a 125-mile radius. (Rule 214.1; R.317-15/3/8) *See Ashley Meadows Farm, Inc. v. American Horse Shows Ass'n*, 609 F. Supp. 677 (S.D.N.Y. 1985).

[5] A modification to the USEF's rules effective in 2006, long after Petitioners' suit was filed, required incumbent promoters for the first time to also meet certain minimum quality requirements to receive renewals. (Am. Rule 218)

[6] Another modification to the Mileage Rule effective in 2006 involved the USEF for the first time in decisions whether to grant waivers, but only an incumbent promoter has the power to initially approve a waiver request. If the incumbent promoter declines to grant a waiver allowing a competing promoter to hold an A-Rated Show, the USEF has no power to reverse that decision. (Am. Rule 214.7)

during the Winter Season in Florida. (R.317-6; R.317-14/8-9/18; R.317-18/5/21) While this small cartel of incumbent promoters has regularly granted waivers to each other (including some that automatically renew every year by written agreement), they have steadfastly refused to grant waivers to any other horse show promoters, including Petitioners, to hold competing shows within 250 miles of their shows. (R.317-14/10-13/22-23; R.317-18/2-3/12-13) This 500-mile wide zone of exclusion has effectively put the entire State of Florida off limits to any non-incumbent promoter who attempts to enter the market to stage an A-Rated Show. (R.317-5; R.317-14/8-9/18; 317-18/5/21) Thus, Petitioners have been permanently precluded from holding A-Rated Shows—the highest rated and most lucrative—during the key Winter Season in Florida.

On May 9, 2005, the District Court granted summary judgment to Defendants, holding principally that the Mileage Rule, the anti-competitive effects of which were undisputed, was impliedly exempt from antitrust scrutiny as a matter of law without reference to, or analysis of, whether the Rule was necessary to effectuate Congress' intent in enacting the ASA. (A.36) In so holding, the District Court did not discuss, or even cite, this Court's landmark decision in *Silver v. New York Stock Exchange*, 373 U.S. 341, 83 S. Ct. 1 (1963), which Plaintiffs discussed at length, even though *Silver* clearly requires such analysis.[7]

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[7] The District Court also held that plaintiffs lacked antitrust standing, that they failed to prove a "conspiracy," that *per se* analysis did not apply and that there was no violation of the Rule of Reason, notwithstanding Defendants' concession of anti-competitive effect. (A.37; A.41; A.46; A.50) However, the Eleventh Circuit did not reach those issues, affirming only on the implied immunity issue.

On appeal to the Eleventh Circuit, Petitioners also discussed the then-recent decision of the United States Court of Appeals for the Second Circuit in *Billing v. Credit Suisse First Boston, Ltd.*, 426 F.3d 130 (2d Cir. 2005), *cert. pending*, No. 05-1157, which was issued during the pendency of the appeal. In particular, Petitioners extensively discussed *Billing's* holding, as mandated by this Court's decisions in *Silver, Gordon v. New York Stock Exchange*, 422 U.S. 659, 95 S. Ct. 2598 (1975), and *United States v. Nat'l Ass'n of Security Dealers*, 422 U.S. 694, 95 S. Ct. 2427 (1975) (*NASD*), that a determination whether a federal regulatory statute confers implied antitrust immunity requires a detailed and extensive examination of the congressional intent underlying the statute, and whether that intent will be thwarted if the rule or conduct at issue is not immunized from the federal antitrust laws.

In affirming the District Court's summary judgment for Defendants, the Eleventh Circuit specifically declined to follow *Billing*, and therefore the decisions of this Court, holding instead that any and all rules adopted by an NGB which purport to deal with subject matters that the ASA authorizes NGBs to regulate are impliedly immune from antitrust scrutiny as a matter of law, without regard to whether the particular rule is in fact necessary to achieve Congress' intent. According to the Eleventh Circuit, all that is required is that the rule at issue be within a general category of rules that the ASA authorizes NGBs to adopt. 458 F.3d at 1230-31. Under this decision, the courts need not analyze whether a rule which otherwise violates the antitrust laws, but which is purportedly adopted pursuant to statutory authority, is really necessary to make the statute work in order to immunize that rule from antitrust scrutiny.

The Eleventh Circuit's ruling stands in sharp conflict not only with the Second Circuit's decision in *Billing*,

but also with the well-settled decisions of this Court concerning implied antitrust immunity.

REASONS FOR GRANTING THE WRIT

In holding that there is blanket immunity from the antitrust laws for a rule adopted pursuant to a federal regulatory statute, without examination or analysis of whether the specific rule, as adopted and enforced, is necessary to effectuate Congress' intent in enacting the regulatory statute, the Eleventh Circuit specifically refused to follow the contrary holding of the Second Circuit in *Billing v. Credit Suisse First Boston Ltd.*, 426 F.3d 130 (2d Cir. 2005). The Eleventh Circuit has thus created not only a conflict between the Circuits but has also has issued a ruling contrary to the settled decisions of this Court.

As discussed above, the Eleventh Circuit accorded blanket antitrust immunity to the Mileage Rule adopted by the USEF as the NGB for equestrian sport under the auspices of the ASA. The court so ruled notwithstanding Defendants' concession (and the District Court's presumption) that the Rule had anti-competitive effects (A.46-47) and notwithstanding that the Rule permits the Promoter Defendants, rather than the NGB itself, to autonomously control exclusion of new entrants into the relevant market (staging A-Rated Shows during the Winter Season in Florida) in plain violation of the ASA's statutory mandate that NGBs are not to delegate such determinations and control over scheduling. *See* 36 U.S.C. § 220522 (a)(5)(A)-(C) (formerly 36 U.S.C. § 391(b)(4)), quoted in *Behagen v. Amateur Basketball Ass'n of the United States*, 884 F.2d 524, 528 (10th Cir. 1989), *cert. denied*, 495 U.S.

918 (1990), cited and relied upon by the Eleventh Circuit. 458 F.3d at 1229.

In *Silver*, 373 U.S. at 357, 83 S. Ct. at 1257, this Court stated the guiding principles for determining whether immunity from antitrust liability will be implied from another federal regulatory law which contains no express exemption from the antitrust laws:

> [A]ny repealer of the antitrust laws must be discerned as a matter of implication, and "it is a cardinal principle of construction that repeals by implication are not favored." [citations omitted]. *Repeal is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary.* This is the guiding principle to reconciliation of the two statutory schemes. (emphasis supplied)

This Court subsequently addressed implied antitrust immunity in several cases, including *Gordon* and *NASD*. The Second Circuit likewise addressed this subject in several other cases, culminating in its comprehensive decision in *Billing*, which reviewed all of its and this Court's decisions and restated the rules concerning implied antitrust immunity. All of these cases follow this Court's seminal decision in *Silver*.

In contrast to the Second Circuit's approach to the implied antitrust immunity issue in *Billing*, the Eleventh Circuit only cited *Behagen* and *Eleven Line, Inc. v. North Texas State Soccer Ass'n, Inc.*, 213 F.3d 198 (5th Cir. 2000), as support for its holding that every rule adopted by an NGB has blanket immunity from the antitrust laws without any examination or analysis of the rule's effects to determine whether the rule is necessary to effectuate congressional intent embodied in the ASA. 458 F.3d at 1231-33. But neither case comes close to standing for such

a broad proposition, in derogation of the principles first laid down in *Silver*.

In *Behagen*, the Tenth Circuit clearly examined the substance of the rule before it, which retained for the NGB itself the sole power to determine who was eligible to play amateur basketball. The court assessed the rule's reasonability and necessity to make the ASA work, as mandated by *Silver*, which the *Behagen* court specifically cited. The court used the term "monolithic control" not to indicate that the actions of NGBs are exempt from the antitrust laws, as the Eleventh Circuit seemed to presume, 458 F.3d at 1230-31, but rather to denote that under the rule in question, the NBG, and only the NGB, could exercise authority to determine player eligibility. 884 F.2d at 527-30.

In *Eleven Line*, the Fifth Circuit held that the rule before it, which governed the facilities where youth soccer could be played and which was not enacted by the NGB but by a state affiliate, was invalid. In reaching its conclusion, the *Eleven Line* court, like the *Behagen* court, carefully considered whether the rule in question was necessary to the conduct of the sport, as *Silver* requires, and therefore impliedly immune from the antitrust laws. 213 F.3d at 204-05.

In *Billing*, the Second Circuit restated, as this Court has uniformly held, that whenever implied immunity is asserted to defend an antitrust attack upon conduct permitted by a rule promulgated pursuant to a federal regulatory statute, the rule at issue must be scrutinized and analyzed with care to determine its reasonability and whether antitrust immunity for the conduct at issue is essential to enable Congress' intent in enacting the regulatory statute to be achieved. 426 F.3d at 164-65. However, the Eleventh Circuit simply dismissed *Billing* as inapposite, stating that "[r]egardless of whether *Billing*

would require a more searching scrutiny of the Mileage Rule, this Court follows the more closely analogous holdings in *Behagen* and *Eleven Line*." 458 F.3d at 1233.

But neither *Behagen*, *Eleven Line* nor any other case supports the Eleventh Circuit's expansive view that the ASA exempts all rules promulgated by NGBs from scrutiny under the antitrust laws on a blanket basis, regardless of the rules' anti-competitive effects. Nor do those cases support an antitrust exemption where, as here, the NGB has failed to exercise "monolithic control" over the subject matter of a rule, instead ceding to self-interested private parties like the Promoter Defendants a significant element of control.[8]

As *Silver*, *Gordon*, and *NASD* make clear, and as *Billing* confirmed, this is not the law and it never has been. Quoting from the opinion of Justice Kennedy (then Circuit Judge) in *Phonetele, Inc. v. American Telephone & Telegraph Co.*, 664 F.2d 716, 727 (9th Cir. 1981), the Second Circuit observed, 426 F.3d at 147 n. 20, that:

> One point must be plain: we must recognize there is no simplistic and mechanically universal doctrine of implied antitrust immunity; each of the Supreme Court's cases is decisively shaped by considerations of the special aspects of the regulated industry involved.

While it is, of course, not appropriate to resolve at this juncture whether the Mileage Rule is unreasonable or unnecessary to make the ASA work, there are very strong arguments to that effect. But those arguments were improperly ignored by the District Court and again by the Eleventh Circuit, which deliberately chose not even to

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[8] As discussed above, if an incumbent promoter decides, in its sole discretion, to grant a Mileage Rule waiver, the 250-mile radius of exclusion is reduced to 10 miles. (Rule 214.7)

discuss, let alone analyze, the necessity for the Rule, holding instead that it—and all other rules adopted by an NGB—have blanket immunity from antitrust analysis.

The Eleventh Circuit's decision, if allowed to stand in direct conflict with *Billing* and the decisions of this Court, will surely undermine Congress' intent in enacting the federal antitrust laws over a century ago. These laws represent Congress' judgment that free competition is the most appropriate method of managing the nation's economy. Now, according to the Eleventh Circuit, courts should simply presume that Congress intended the nation's bedrock competition policy to give way whenever a regulatory body, whether governmental or private, adopts a rule that is arguably within its statutory authority.

The Eleventh Circuit's decision is contrary not only to *Billing*, which currently pends before this Court on Petition for Writ of Certiorari, and the many Circuit Court of Appeals cases cited in *Billing*, it is also contrary to numerous decisions by this Court, including *Silver*, *Gordon*, and *NASD*. Petitioners respectfully submit that the Eleventh Circuit's decision directly contradicts all settled law on implied antitrust immunity and that it should be reversed.

CONCLUSION

For each and all the foregoing reasons, Petitioners respectfully pray that this Court issue a Writ of Certiorari and thereafter reverse the judgment of the United States Court of Appeals for the Eleventh Circuit.

Respectfully Submitted,

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APPENDIX

**United States Court of Appeals,
Eleventh Circuit.**

JES PROPERTIES, INC., a Florida corporation, d.b.a. Cypress Trails Farm, Michael W. Gallagher,
Plaintiffs-Appellants,
v.
USA EQUESTRIAN, INC., f.k.a. American Horse Show Assoc., et al., Dave Burton, a.k.a. Dave Burton, Sr., a.k.a. Dave E. Burton, a.k.a. Dave E. Burton, Sr., Burton & Sons, Inc., Littlewood Fences, Inc., David Burton, a.k.a. David Burton, Jr., a.k.a. David E. Burton, a.k.a. David E. Burton, Jr., United States Equestrian Federation, Inc., Stadium Jumping, Inc., Eugene R. Mische, et al.,
Defendants-Appellees.

No. 05-13255.

Aug. 2, 2006.

Appeal from the United States District Court for the Middle District of Florida.

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Before EDMONDSON, Chief Judge, and BIRCH and ALARCÓN[1], Circuit Judges.

ALARCÓN, Circuit Judge:

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[1] Honorable Arthur L. Alarcón, United States Circuit Judge for the Ninth Circuit, sitting by designation.

JES Properties, Inc. ("JES") and Michael W. Gallagher appeal from the District Court's entry of summary judgment in favor of United States Equestrian Federation ("USEF"); Thomas E. Struzzieri, *1226 Horse Shows in the Sun, Inc., and Rose View Stables, Ltd (collectively, "HITS"); Eugene R. Mische and Stadium Jumping, Inc. (collectively, "SJI"); and David E. Burton, Sr. David E. Burton, Jr., Burton and Sons, Inc., and Littlewood Fences, Inc. (collectively, the "Burtons") (HITS, SJI and the Burtons are referred to collectively as the "Promoter Defendants"). The District Court concluded that JES and Mr. Gallagher had failed to raise a triable issue of fact regarding their claim that the USEF and the Promoter Defendants violated Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1. We affirm.

Since 1917, the United States Equestrian Federation ("USEF") and its predecessor the USA Equestrian, Inc. ("USAE") have governed the sport of amateur equestrianism in the United States. The rules that govern all American equestrian competitions were promulgated originally by the USAE. In June 2004, the United States Olympic Committee ("USOC"), pursuant to the Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C. § 220501 *et seq.* ("ASA"), officially appointed the USEF as the sole national governing body for the sport ("NGB"). When appointed as the NGB, the USEF's Board of Directors adopted the same rules promoted by USAE, but with some changes effective in 2006.

The USEF consists of private individuals such as professional and amateur rider-athletes, trainers, judges, horse owners and officials; non-profit amateur sports organizations such as the North Florida Hunter and Jumper Association, Inc.; and promoters who profit financially by holding equestrian competitions. The USEF maintains a fifty-four member Board of Directors to promulgate the rules of the sport. The Board of Directors

of the USEF contains ten members of the hunter/jumper community and no less than twenty percent of the voting power is allocated to "active equestrian athletes." An "active athlete" is one who is engaged in equestrian competition or has represented the United States at an amateur international competition within the past ten years.

The NGB rules sanction certain equestrian competitions called "recognized competitions," which provide particular benefits to riders and promoters. Recognized competitions allow riders to collect points from wins. Wins lead to invitations to more prestigious competitions. In addition, recognized competitions award a total prize money amount of $10,000 or more for the "jumper" section of the competition.

Recognized competitions that are considered "A" or "AA-rated" are the highest rated competitions. They award the most points and in theory attract the best riders. In order to represent the United States at an international level, including the Olympic Games, athletes must compete in USEF-sanctioned competitions and typically excel in the A or AA-rated competitions.

All recognized competitions are subject to General Rule 214.7 ("Mileage Rule"), which was promulgated in 1975 by USAE (known at that time as the American Horse Shows Association) and adopted by the USEF.[2] The Mileage Rule

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[2] The Mileage Rule provides:

New competitions offering "A" rated hunter or jumper divisions or sections will not be recognized on dates conflicting with those of any other Recognized Competition within the applicable distance specified by this rule which offers A rated hunter or jumper divisions or sections, regardless of class scheduling . . .. The mileage restrictions . . . will not prevent two Hunter/Jumper competitions from being approved if the two competitions have

(continued...)

requires *1227 that any A-rated recognized competitions held on the same date must be held at least 250 miles away from each other. This is true for all but some Northeastern states, which are subject to a 125-mile radius distance for A-rated competitions. The required distance diminishes as the rating decreases. Unrated or local competitions on the same date can be held within fifty miles of each other.

Under the Mileage Rule, an A-rated competition that was held on a certain date in the previous year receives priority. A promoter may nevertheless obtain USEF recognition if all "affected competition managements" agree in writing to permit the additional recognized competition. This written agreement is referred to as a "waiver." Stricter still for hunter/jumper competitions, the USEF requires a waiver for each year and an additional competition can never be closer than ten miles from an established one. However, a promoter may hold an A-rated competition elsewhere or on a different date without obtaining a waiver. Similarly, a promoter may hold B- or C-level competitions. The purpose of the Mileage Rule appears to be twofold. First, it aims to concentrate elite riders into fewer competitions in order to yield the most competitive international equestrian team possible. Second, the rule intends to promote equestrianism nationwide by forcing promoters to hold recognized competitions in more diverse locations.

JES and Mr. Gallagher are among those USEF members who gain financially from promoting equestrian competitions. The Promoter Defendants also hold competitions for

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[2] (...continued)
different competition managements and the competition with priority gives written permission, to be renewed annually, and the mileage distance between competitions is at least 10 miles.

profit. JES, Mr. Gallagher, and the Promoter Defendants have conducted USEF sanctioned competitions throughout the state of Florida. JES, Mr. Gallagher, HITS, and the Burtons have also held unrecognized competitions in Florida.

In Florida, the weather is desirable for equestrian competition in the winter months, December through March. Because of the weather, the most lucrative and profitable winter season competitions occur in Florida. For the winter seasons of 2003-2004, 2004-2005, and 2005-2006, the Promoter Defendants planned every weekend to hold A-rated competitions in Florida. The Promoter Defendants secured these dates and facilities in Florida before JES and Mr. Gallagher. Due to the Mileage Rule, JES and Mr. Gallagher were unable to secure a date between December and March on which to hold A or AA-rated competitions in Florida. As provided by the rule, JES and Mr. Gallagher requested waivers from the "affected competition managements," the Promoter Defendants. The Promoter Defendants denied JES's and Mr. Gallagher's requests for waivers.

In 1982, HITS and SJI granted each other waivers that have been renewed each subsequent year. The reciprocal agreement permitted each promoter to hold USEF sanctioned A-rated competitions within the 250 mile restriction.

JES and Mr. Gallagher filed a complaint challenging the Mileage Rule as a violation of the Sherman Antitrust Act. They also alleged that the Promoter Defendants committed antitrust violations by granting each other waivers while refusing to grant waivers to JES and Mr. Gallagher. The District Court entered summary judgment in favor of the USEF and the Promoter Defendants. It concluded that (1) each defendant was entitled to implied immunity from

antitrust liability; (2) JES and Mr. Gallagher lacked antitrust standing; (3) JES and Mr. Gallagher failed to present evidence of concerted action; and (4) the Rule of Reason applied to the USEF's and the Promoter Defendants' actions, and their actions were not an unreasonable *1228 restraint of trade. JES and Mr. Gallagher timely appeal each of those conclusions. We conclude that the USEF and the Promoter Defendants are entitled to implied immunity. We address standing briefly, but we do not reach the other issues raised by JES and Mr. Gallagher.

II

A.

JES and Mr. Gallagher argue that the District Court erred in its determination that they lacked antitrust standing. Whether a plaintiff has standing to prosecute an antitrust claim is a question of law. *Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1448 (11th Cir.1991).* "Standing in an antitrust case involves more than the 'case or controversy' requirement that drives constitutional standing." *Id.* (citing *Flast v. Cohen,* 392 U.S. 83, 94-101, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968)). Rather, antitrust standing "involves an analysis of prudential considerations aimed at preserving the effective enforcement of the antitrust laws." *Id.*

Because we conclude that the USEF and the Promoter Defendants are immune from antitrust liability, we need not determine whether JES and Mr. Gallagher have standing. *Levine v. Central Fla. Med. Affiliates, Inc.,* 72 F.3d 1538, 1545 (11th Cir.1996). In *Levine,* this Court noted:

> When a court concludes that no [antitrust] violation has occurred, it has no occasion to consider standing . . . . An increasing number of courts, unfortunately, deny standing when they really mean that no violation has occurred. In particular, the antitrust injury element of standing demands that the plaintiff's alleged injury result from the threat to competition that underlies the alleged violation. A court seeing no threat to competition in a rule-of-reason case may then deny that the plaintiff has suffered antitrust injury and dismiss the suit for lack of standing. Such a ruling would be erroneous, for the absence of any threat to competition means that no violation has occurred and that even suit by the government—which enjoys automatic standing—must be dismissed.

Id. (quoting 2 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law*, ¶ 360f, at 202-03 (rev. ed.1995) (footnotes omitted)). This Court has previously "ruled on the merits of an antitrust claim without ever deciding whether the plaintiff has antitrust standing." *Id.*

We see no difference between the example offered in *Levine*—a court seeing no threat to competition in a rule-of-reason case—and our conclusion in this case that the USEF and the Promoter Defendants are immune from antitrust liability because the ASA impliedly repeals the antitrust laws to the extent the USEF was acting pursuant to authority conveyed by the ASA. A defendant is entitled to implied immunity when its actions are necessary for the effective operation of a law enacted by Congress. *See infra*, Part IB; *Silver v. New York Stock Exch.*, 373 U.S. 341, 357, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963). No party is able to establish an injury to competition under such circumstances because implied repeal of the antitrust laws represents a policy decision by Congress to tolerate that level of threat to competition. *See id.* at 359 (concluding

that New York Stock Exchange regulation did not impliedly repeal antitrust laws when, *inter alia,* it produced "competitive injury . . . when the imposition of such injury [was] not within the scope of the great purposes of the Securities Exchange Act."). We therefore turn to the merits of JES and Mr. Gallagher' antitrust claim.

B.

JES and Mr. Gallagher next argue that the District Court erred in concluding that the ASA impliedly repeals the antitrust *1229 laws, thus giving the USEF and the Promoter Defendants immunity from antitrust liability. A district court's decision to grant summary judgment is reviewed *de novo. Holloman v. Mail-Well Corp.,* 443 F.3d 832, 836 (11th Cir.2006). Summary judgment is appropriate if the moving party demonstrates that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

In *Silver,* the Supreme Court held that under certain circumstances, a defendant is immune from antitrust liability because his or her actions are permitted by overriding federal law. *Silver,* 373 U.S. at 357, 83 S.Ct. 1246. "Repeal of the antitrust laws by implication is not favored and not casually to be allowed. Only where there is a 'plain repugnancy between the antitrust and regulatory provisions' will repeal be implied." *Gordon v. New York Stock Exch., Inc.,* 422 U.S. 659, 682, 95 S.Ct. 2598, 45 L.Ed.2d 463 (1975) (quoting *United States v. Philadelphia Nat'l Bank,* 374 U.S. 321, 350- 51, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963)). "Repeal is to be regarded as implied only if necessary to make [another federal law] work, and even then only to the minimum extent necessary. This is the guiding principle to reconciliation of . . . two statutory schemes." *Silver,* 373 U.S. at 357, 83 S.Ct. 1246.

In this case, the USEF and the Promoter Defendants argue that the ASA impliedly repeals the antitrust laws. The ASA was enacted "to correct the disorganization and serious factional disputes that seemed to plague amateur sports in the United States." *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee,* 483 U.S. 522, 544, 107 S.Ct. 2971, 97 L.Ed.2d 427 (1987) (citations and internal quotations omitted). Under the ASA, the United States Olympic Commission ("USOC") is authorized to recognize one national governing body ("NGB") for each sport included in the program of the Olympic games.

> The NGB must satisfy a number of requirements, including the ability to "demonstrate[ ] that it is autonomous in the governance of its sport, in that it independently determines and controls all matters central to such governance, does not delegate such determination and control, and is free from outside restraint."
>
> *Behagen v. Amateur Basketball Ass'n of the United States,* 884 F.2d 524, 528 (10th Cir.1989) (quoting 36 U.S.C. § 391(b)(4)).

The ASA provides:

(a) Authority—For the sport that it governs, a national governing body may—

(1) represent the United States in the appropriate international sport federation;

(2) establish national goals and encourage attainment of those goals;

(3) serve as the coordinating body for amateur athletic activity in the United States; . . .

(6) recommend to the [USOC] individuals and teams to represent the United States in the Olympic Games . . .

36 U.S.C. § 220523.

For the sport that it governs, a national governing body *shall*—

(1) develop interest and participation throughout the United States and be responsible to the persons and amateur sports organizations it represents;

(2) minimize, through coordination with other amateur sports organizations, conflicts in the scheduling of all practices and competitions[.]

36 U.S.C. § 220524 (emphasis added). "The [ASA] provides for ongoing review of the NGB by the USOC in order to ensure compliance with the [ASA]." *Behagen,* 884 F.2d at 528.

The USEF is the NGB for equestrian sports in the United States. The USEF *1230 and the Promoter Defendants argue that the ASA confers on the USEF the authority to promulgate the Mileage Rule and that application of the antitrust laws to the enforcement of the Mileage Rules is plainly repugnant to that authority.

In *Behagen,* the Tenth Circuit considered whether the ASA impliedly repealed the antitrust laws. *Id.* In that case, Ronald Behagen, a basketball player, was deemed ineligible to play amateur basketball by the Amateur Basketball Association of the United States of America ("ABA/USA"), the NGB for basketball. *Id.* at 525-26. The ABA/USA had an eligibility rule that stated that once a player had played professionally, he or she could return to amateur basketball only once. *Id.* at 526. Mr. Behagen had played professionally, returned to amateur play, returned to professional play, and again sought to return to amateur play. *Id.* The ABA/USA, based on its eligibility rule, would not permit Mr. Behagen to play. *Id.*

Mr. Behagen alleged that the refusal to permit him to play constituted a violation of § 1 of the Sherman Antitrust Act. *Id.* at 527. Section 1 reads in relevant part, "Every

contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. Mr. Behagen alleged that the refusal constituted an illegal group boycott. The jury agreed and awarded him treble damages. *Behagen,* 884 F.2d at 527.

The court held that

> the antitrust issue should not have gone to the jury. The defendants' actions in this case were clearly within the scope of activity directed by Congress, and were necessary to implement Congress' intent with regard to the governance of amateur athletics. We therefore hold that the defendants' allegedly violative actions here are exempt from the coverage of the federal antitrust laws.

Id. The court reasoned that the ASA conferred "monolithic control" on the NGB to regulate "its particular amateur sport, including . . . controlling amateur eligibility for Americans to participate in that sport." *Id.* at 529. Although the ASA did not explicitly repeal the federal antitrust laws as they pertain to the actions of an NGB, "the directives of the [ASA made] the intent of Congress sufficiently clear." *Id.* Mr. Behagen complained of "exactly that action which the [ASA] directs—the monolithic control of an amateur sport by the NGB for that sport . . .." *Id.*

The question whether the ASA impliedly repeals antitrust laws was again considered in *Eleven Line, Inc. v. North Texas State Soccer Ass'n, Inc.,* 213 F.3d 198 (5th Cir.2000). In *Eleven Line,* the owner of an indoor soccer facility brought suit against the North Texas State Soccer Association ("NTSSA"), alleging it violated the antitrust laws in enacting a rule that forbade its members from playing at any non-NTSSA sanctioned facility. *Id.* at 199. The court concluded that the actions of the NTSSA were

not immune from antitrust liability because it was the state association, not the NGB, that promulgated the rule. *Id.* at 204. However, it concluded that *Behagen* was correctly decided. It explained,

> Although the facts of this case do not support an implied exemption from the antitrust laws, an implied exemption would be appropriate in many other situations. For example, if the national state associations all over the country had a similar rule, one could infer that the rule was necessary to the management of the sport.

Id.

As *Behagan* and *Eleven Line* demonstrate, when properly exercised, the "monolithic *1231 control" a NGB has over its particular support may excuse actions that would otherwise violate antitrust laws. Therefore, the question for this Court is whether the application of the antitrust laws to the facts of this case would "unduly interfere" with the "operation" of the ASA. *Gordon,* 422 U.S. at 686, 95 S.Ct. 2598.

Congress has specifically required NGB's to minimize conflicts in the scheduling of competitions and to "develop interest and participation throughout the United States" in their particular sport. 36 U.S.C. § 220524. The Mileage Rule functions to minimize conflicts and encourages interest in equestrian sports. It forbids competitions of the same rating from being held on the same days within 250 miles of each other. The USEF and the Promoter Defendants adduced evidence that the rule enables the best athletes to compete against each other. If two competitions of the same rating were in close proximity, top athletes may avoid competition against each other and go to different competitions. The USEF and the Promoter Defendants also produced evidence that the rule protects horses from being overworked. If two competitions were

very close by on the same dates, horses may be taken from one competition to the next without sufficient rest. Additionally, the rule encourages the spread of equestrian sports throughout the country. If a competition cannot be held in one locality, a promoter may decide to hold a competition in a region in which competition has never been held. Therefore, the Mileage Rule is an exercise of the "monolithic control" Congress conferred on the USEF.

JES and Mr. Gallagher argue that the USEF and the Promoter Defendants should not enjoy implied immunity because the Mileage Rule is not "necessary" for the USEF to perform its functions under the ASA. They focus on language in *Behagen:* "defendants' actions in this case were clearly within the scope of activity directed by Congress, and were *necessary to implement Congress' intent with regard to the governance of amateur athletics.*" *Behagen,* 884 F.2d at 527 (emphasis added). JES and Mr. Gallagher contend that if the USEF and equestrian sports can function without the Mileage Rule, the USEF and the Promoter Defendants are not entitled to immunity.

JES's and Mr. Gallagher's arguments regarding why the Mileage Rule is not necessary focus on whether the rule is an effective or wise way of implementing the power given the USEF to minimize conflicts in scheduling and develop interest in equestrian sports throughout the United States. They argue, in effect, that the rule is underinclusive because it can be waived in various circumstances. They argue that the rule is counterproductive because it impedes JES and Mr. Gallagher from entering the sport and competing with other promoters to enhance the quality of competitions. They also argue that because the rule was not promulgated until 1975, it must not be necessary (or else it would have been promulgated earlier). They argue that because in the Northeast, the required distance between competitions is only 125 miles, the 250-mile restriction must not be necessary.

JES's and Mr. Gallagher's reading of *Behagen* is inconsistent with Supreme Court authority. In *Gordon*, the Supreme Court considered a challenge to commission rates fixed by the New York Stock Exchange ("NYSE"). *Gordon*, 422 U.S. at 661-62, 95 S.Ct. 2598. It concluded that the NYSE had immunity from antitrust liability because the power to fix commission rates was specifically conferred by the Securities Exchange Act. *Id.* at 668, 691, 95 S.Ct. 2598. The United States, as amicus, argued that whether a defendant is entitled to implied immunity was a question *1232 of fact to be decided after a trial on the merits. *Id.* at 686, 95 S.Ct. 2598. The Court concluded that this argument "confused two questions." *Id.* at 688, 95 S.Ct. 2598. The Court explained:

> On the one hand, there is a factual question as to whether fixed commission rates are actually necessary to the operation of the exchanges as contemplated under the Securities Exchange Act. On the other hand, there is a legal question as to whether allowance of an antitrust suit would conflict with the operation of the regulatory scheme which specifically authorized the SEC to oversee the fixing of commission rates. The factual question is not before us in this case. Rather, we are concerned with whether antitrust immunity, as a matter of law, must be implied in order to permit the Exchange Act to function as envisioned by Congress. The issue of the wisdom of fixed rates becomes relevant only when it is determined that there is no antitrust immunity.

Id.

Additionally, JES's and Mr. Gallagher's understanding of what makes a rule "necessary" according to *Behagen* is too restrictive. In *Behagen*, the court did not consider whether the *particular* eligibility rule was necessary or otherwise examine the wisdom of the rule. It simply

concluded that promulgating eligibility rules was necessary in order for the NGB to carry out its role as defined by the ASA. *See generally Behagen,* 884 F.2d 524- 30. Similarly, in *Eleven Line,* the court concluded that the NTSSA rule was not necessary. *Eleven Line,* 213 F.3d at 204-05. However, the court then listed a whole host of rationales that may have justified the NTSSA rule. It did not delve into an analysis of whether the rule would be wise or indispensable under any of those circumstances. *Id.*

This Court will not substitute its own judgment for that of the USEF regarding the optimum way to fulfill its obligations. *Cf. Brookins v. Int'l Motor Contest Ass'n,* 219 F.3d 849, 853 (8th Cir.2000) (stating that regarding antitrust challenges to rules defining professional sports activities, authorities have been given considerable discretion to achieve their sporting objectives, absent any demonstrated market foreclosure). If this Court were to apply the test that JES and Mr. Gallagher suggest—determining whether the Mileage Rule is necessary—it would threaten the national uniformity Congress envisioned in enacting the ASA. *San Francisco Arts & Athletics, Inc.,* 483 U.S. at 544, 107 S.Ct. 2971 (discussing need for ASA to eliminate factions in amateur sports). This inability to engage in the analysis JES and Mr. Gallagher suggest without disrupting the ASA illustrates why implied immunity is called for in this case. The question before this Court is whether the application of antitrust laws to the actions of the USEF and the Promoter Defendants is "plainly repugnan[t]" to the ASA. *Gordon,* 422 U.S. at 682, 95 S.Ct. 2598. Because the ASA requires an NGB to promulgate rules to minimize conflicts in schedules, the imposition of antitrust liability for the promulgation of such a rule is "plainly repugnan[t]" to the ASA.

JES and Mr. Gallagher also argue that this Court should apply a multi-factor test enunciated by the Second Circuit in *Billing v. Credit Suisse First Boston Ltd.*, 426 F.3d 130 (2d Cir.2005) to the question whether the ASA impliedly repeals the antitrust laws. In *Billing*, the court held that when a "potential specific conflict" exists between a regulatory rule and antitrust laws courts

> will apply immunity if [they] determine that Congress contemplated the specific conflict and intended for the antitrust laws to be repealed. That determination *1233 is informed by considering (1) congressional intent as reflected in legislative history and a statute's structure; (2) the possibility for conflicting mandates; (3) the possibility that application of the antitrust laws would moot a regulatory provision; (4) the history of agency regulation of the anticompetitive conduct; and (5) any other evidence indicating that the statute implies a repeal.

Id. at 164-65.

JES's and Mr. Gallagher's arguments applying *Billing* in substance repeat the arguments pertaining to whether the Mileage Rule is necessary. They argue that the Mileage Rule, as a particular exercise of power by the USEF, is not what Congress had in mind when it enacted the ASA and granted NGB's authority. Regardless of whether *Billing* would require a more searching scrutiny of the Mileage Rule, this Court follows the more closely analogous holdings in *Behagen* and *Eleven Line.*

AFFIRMED.

United States District Court,
M.D. Florida.

JES PROPERTIES, INC. d/b/a Cypress Trails Farm, a Florida corporation, and
Michael W. Gallagher, Plaintiffs,
v.
USA EQUESTRIAN, INC. (formerly the American Horse Show Association), et al.,
Defendants.
No. 802CV1585T24MAP.

May 9, 2005.

ORDER

BUCKLEW, J.

*1 This cause comes before the Court for consideration of the following motions: Defendant United States Equestrian Federation, Inc.'s ("USEF") Motion for Summary Judgment and Request for Oral Argument (Doc. No. 287); Defendants', David E. Burton, Sr., David E. Burton, Jr., Burton and Sons, Inc. and Littlewood Fences, Inc. (collectively, "the Burton Defendants"), Motion for Summary Judgment (Doc. No. 290); Defendants', Thomas Struzzieri ("Struzzieri"), Horse Shows in the Sun, Inc. ("HITS") and Rose View Stables, Ltd. ("Rose View Stables")(collectively "the HITS Defendants"), Motion for Summary Judgment (Doc. No. 292) and Defendants, Stadium Jumping, Inc. ("Stadium Jumping") and Eugene R. Mische ("Mische)(collectively, "the Stadium Jumping Defendants"), Motion for Entry of Final Summary Judg-

ment (Doc. No. 294).[1] The Court shall refer to the Burton Defendants, the HITS Defendants and the Stadium Jumping Defendants collectively as the "Promoter Defendants." With leave of the Court, Plaintiffs filed a Combined Response to Defendants' Summary Judgment Motions (Doc. No. 317)(hereinafter "Response to Motions for Summary Judgment"). With leave of the Court, USEF filed a Reply Brief on the Limited Issue of Antitrust Immunity (Doc. No. 343) and Plaintiffs filed a Sur-Reply to USEF's Reply on the Limited Issue of Antitrust Immunity (Doc. No. 344).

I. Procedural History

On August 29, 2002, Plaintiffs filed a three-count Complaint which raised claims of unreasonable restraint of trade under section 1 of the Sherman Act (Count I), monopolization and attempted monopolization under section 2 of the Sherman Act (Count II), and claims of conduct, practices and activities which have the likelihood of substantially lessening competition under section 7 of the Clayton Act (Count III). Upon Defendants' motions this Court dismissed the Complaint, but granted Plaintiffs leave to amend (Doc. No. 39).

On April 18, 2003, Plaintiffs filed a nine-count Amended Complaint (Doc. No. 42) in which they alleged claims for

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[1] The Court notes that the only other remaining Defendants, Linda S. Aldrich and Fox Lea Farm, Inc. did not file dispositive motions. Several Defendants, USA Equestrian Trust, Inc., f/k/a USA Equestrian, Inc. ("USAE") (formerly The American Horse Shows Association, Inc.("AHSA")), Bob Bell, Classic Company Ltd., Kernan Hodges a/k/a Mrs. George H. Hodges, Jr. and North Florida Hunter & Jumper Association, Inc. apparently settled with the Plaintiffs and have been dismissed from the case (Doc. Nos. 195, 261, 267 and 350).

violation of Section 1 of the Sherman Act, violation of Section 2 of the Sherman Act, violation of Florida's Antitrust Act and violation of the Florida Deceptive and Unfair Trade Practices Act. In the Amended Complaint, Plaintiffs also added an additional Defendant, North Florida Hunter & Jumper Association, Inc. ("NFHJA"). On October 10, 2003, this Court denied Defendants' Motions to Dismiss the First Amended Complaint (Doc. No. 59).[2]

On December 19, 2003, Plaintiffs sought leave to file a fourteen count Second Amended Complaint to add Eugene R. Mische, Stadium Jumping, Inc., Thomas E. Struzzieri, Horse Shows in the Sun, Inc., Linda S. Aldridge, Fox Lea Farm, Inc., and United States Equestrian Federation, Inc. ("USEF") as additional defendants (Doc. No. 77). As Defendants did not oppose this second amendment, the Court granted Plaintiffs leave to file a Second Amended Complaint (Doc. No. 81). In the Second Amended Complaint, Plaintiffs again alleged claims for violation of Section 1 of the Sherman Act, violation of Section 2 of the Sherman Act, violation of Florida's Antitrust Act and violation of the Florida Deceptive and Unfair Trade Practices Act.

*2 Almost a year later, on December 16, 2004, Plaintiffs sought leave to file a Third Amended Complaint to add Roseview Stables Ltd. as an additional defendant (Doc. No. 250). Again Defendants did not oppose this third amendment, and the Court granted Plaintiffs leave to file a Third Amended Complaint (Doc. No. 257). In the Third Amended Complaint, Plaintiffs allege that the rules of USAE and

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[2] The Court notes that as to Plaintiff Gallagher, the Court granted without prejudice the Burton Defendants' Motion to Dismiss the First Amended Complaint since Plaintiff Gallagher did not allege compliance with "the Federation procedures and did not plead he sought a waiver of the Mileage Rule from the Burton Defendants" (Doc. No. 59).

USEF, more specifically, the "Mileage Rule,"[3] and Defendants' alleged refusal to waive application of that rule violate section 1 of the Sherman Act (Count I). Counts II—IV raise claims of monopolization, attempted monopolization, and conspiracy to monopolize in violation of section 2 of the Sherman Act. Counts V-VIII raise claims of violations of the Florida Antitrust Act, Fla. Stat. § § 542.18 and 542.19. Count IX alleges violations of the Florida Deceptive and Unfair Trade Practices Act. USEF, the Burton Defendants, the HITS Defendants and the Stadium Jumping Defendants now move for summary judgment as to all counts of the Third Amended Complaint.

II. Factual Background[4]

This antitrust case arises from an unusual factual situation involving the sanctioning of hunter and jumper horse show competitions in the state of Florida during the winter months. USEF, a New York not-for-profit corpora-

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[3] The Mileage Rule provides, in part, that in all States other than Maine, New Hampshire, Vermont, Connecticut, Rhode Island, New Jersey, New York and Pennsylvania, horse shows offering "A" rated hunter and jumper events must be held at least 250 miles apart on the same date. The Mileage Rule may be waived by a conflicting horse show promoter.

[4] The Court will not restate the entire factual background of this case. Instead, the Court incorporates by reference the factual background as outlined in the Court's Order granting the Burton Defendants, the Federation, the Bell Defendants and Defendant Hodges' Motions to Dismiss (Doc. No. 39) and the Court's Order denying Defendants' Motion to Dismiss the First Amended Complaint (Doc. No. 59).

tion, is the current[5] national governing body ("NGB") for equestrian sport in the United States under the Ted Stevens Olympics and Amateur Sports Act ("Amateur Sports Act" or "ASA"), 36 U.S.C. § § 220501 et seq. (Doc. No. 289, Exh. 1, Long Decl., ¶ 3 and Doc. No. 317, Exh. H, O'Connor Dep. p. 23). USEF has over 80,000 members in 27 breeds and disciplines. (Doc. No. 305). USEF is not a promoter, operator, or manager of horse shows. (Doc. No. 289, Exh. 1, Long Decl., ¶ 17). USEF did not exist prior to 2003 and has been the NGB for equestrian sport in the United States since June 2004. (Doc. No. 289, Exh. 1, Long Decl., ¶ 4). USEF is a separate legal entity from USAE with its own ownership and management. (Doc. No. 289, Exh. 1, Long Decl., ¶ 8). Due in part to a delay in the Internal Revenue Service's recognizing USEF's not-for-profit status, which is a requirement under the Amateur Sports Act for all NGBs, USEF entered into a Management and License Agreement ("Agreement") with USAE. Under this Agreement, USEF carried out USAE's obligations as the NGB from December 2003 through May 2004, including processing applications for the current equestrian competition year (2005) on behalf of USAE. (Doc. No. 289, Exh. 1, Long.Decl., ¶ 5).

USEF, and predecessor NGBs, promulgated a variety of rules, including rules that sanction hunter and jumper horse shows as "Recognized Competitions."[6] (Doc. No. 305, GR208, pp. GR11—GR12). These rules are embodied in the

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[5] Replacing former NGB, USA Equestrian, Inc. ("USAE"), formerly known as the American Horse Show Assocation ("AHSA"). In its previous Orders, the Court referred to USAE as the Federation for that period prior to December 1, 2003.

[6] The Court notes that in their Third Amended Complaint the Plaintiffs utilize the term "Recognized Horse Shows."

2005 USEF Rule Book. (Doc. No. 305). Each Promoter Defendant agrees to abide by the rules as a condition of membership. (Doc. No. 305, GR210, pp. GR12—GR13). Recognized Competitions enjoy privileges not available to other competitions. (Doc. No. 305, GR209, p. GR12). Plaintiffs allege that Recognized Competitions provide unique benefits to competitors and those who put on horse shows which are only available by repeat participation at such USEF-sanctioned shows. Plaintiffs further allege that horse show promoters can benefit economically from holding Recognized Competitions. (Doc. No. 317, Exh. K, Weiland Decl ., ¶ ¶ 15 and 16). The Mileage Rule which governs Recognized Competitions for hunter and jumper competitions rated "A" and above[7] ("A-Rated Shows") was implemented in 1975. (Doc. No. 317, Exh. I, Balch Dep. p. 100).

*3 In its current form, the Mileage Rule, for hunter and jumper Recognized Competitions in Group 2 states (which includes Florida), provides a "250-mile radius for competitions with any of the same A rated sections, or unrated Jumper sections and classes with total prize money of $10,000 or more." (Doc. No. 305, GR214(2), p. GR16). In the 1980's the Mileage Rule applicable to the New England and Middle Atlantic states was reduced to a 125 miles radius. (Doc. No. 305, GR214(1), pp. GR15—GR16; Doc. No. 317, Exh. L, Swann Decl., ¶ 8 and Doc. No. 317, Exh. L, Long Dep. p. 99). Lesser mileage distances apply for "B" and "C" rated horse shows. (Doc. No. 305, GR214(2), pp.GR15—GR16). USEF General Rule 214(7),[8] which controlled the sanctioning of new A-Rated Shows during the course of the present litigation and is part of the Mileage Rule, stated in relevant part:

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[7] "A" or "AA."

[8] Now amended.

New competitions offering "A" rated hunter or jumper divisions or sections will not be recognized on dates conflicting with those of any other Recognized Competitions within the applicable distance specified by this rule which offers A rated hunter or jumper divisions or sections, regardless of class scheduling . . . The mileage restrictions . . . will not prevent two Hunter/Jumper competitions from being approved if the two competitions have different competition managements and the competition with priority gives written permission, to be renewed annually, and the mileage distance between the competitions is at least 10 miles.

(Doc. No. 305, GR214(7), pp.GR16 -GR17).

USEF initially adopted the rules of the Federation as its own. (Doc. No. 289, Exh. 1, Long Decl., ¶ 9). In January 2004, the USEF Board created a task force to study the Mileage Rule and related rules, and recommend appropriate changes, if any. (Doc. No. 289, Exh. 1, Long Decl., ¶ 10). In January 2005, USEF's Board passed several rule changes (the "January 2005 rule changes"),[9] including but not limited to: 1) giving USEF ultimate control over the granting or denying of waivers under the Mileage Rule, and 2) enacting a "license agreement" regime under which USEF has the right to refuse to renew applications of now-established competitions if such competitions fail to satisfy certain objective standards. (Doc. No. 289, Exh. 1, Long Decl., ¶ 11 and Doc. No. 344, Exh. A.). By way of example, although the Mileage Rule previously provided that a promoter of a horse show could, in its sole discretion, waive an objection to the holding of another similarly rated horse show within the applicable mileage restriction, new General Rule 213 provides, in relevant part: "The Federation shall reserve the right to have final approval on the

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[9] Effective May 1, 2005.

granting or denying of waivers and will not delegate this responsibility to any other entities or parties." (Doc. No. 289, Exh.1, Long Decl., Exh. C thereto and Doc. No. 344, Exh. A thereto). No mileage restrictions apply to a horse show promoter who wishes to hold a horse show that is "unrated,"i.e., not sanctioned by the USEF. (Doc. No. 286, Struzzieri Decl., ¶ 4).

*4 In their Third Amended Complaint, Plaintiffs define the relevant product market as "[h]unter and jumper equestrian competitions recognized by the Federation as hunter and jumper competitions 'A' rated and above." Third Am. Compl. ¶ 151. They also define the relevant geographic market as the state of Florida between December 1 and March 31 of each year (the "Winter Months"). Third Am. Compl. ¶ ¶ 154—158. Therefore, the Relevant Market is defined as A-Rated Shows in the state of Florida during the Winter Months. Third Am. Compl. ¶ 159.[10]

Plaintiffs are horse show promoters. Dr. Douglas Weiland ("Weiland"), the principal of Plaintiff JES Properties, Inc. ("JES"), began holding unrecognized horse shows at his Cypress Trails Farm facility in Odessa, Florida in 1998. (Doc. No. 317, Exh. K, Weiland Decl. ¶ ¶ 3 and 4). Weiland registered JES with USAE in 2000 and began to conduct Recognized Competitions during the summer months since no other promoters had conflicting dates in those months. (Doc. No. 317, Exh. K, Weiland Decl., ¶ 4). Weiland held six A-Rated Shows at Cypress Trails Farm in

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[10] For the limited purpose of ruling on Defendants' summary judgment motions this Court will accept that Plaintiffs' definition of the Relevant Market is correct. However, the Court notes that the Burton Defendants and HITS Defendants argue that the relevant product market should not be "A" rated hunter and jumper shows (Doc. Nos. 291 and 292).

the summers of 2001 and 2002,[11] and held 25 unrated shows between 1998 and 2003. (Doc. No. 317, Exh. K, Weiland Decl., ¶ 11). Weiland intended to run A-Rated Shows in the Relevant Market if it was possible to do so. (Doc. No. 317, Exh. K, Weiland Decl., ¶ 14). However JES was unable to obtain dates for A-Rated Shows in the Relevant Market due to the application of the Mileage Rule by the NGB and JES' inability to obtain waivers from the Promoter Defendants who controlled the dates. (Doc. No. 317, Exh. K, Weiland Decl., ¶ ¶ 21—23). JES was actually unable to hold horse shows at the Cypress Trails Farm after 2003 due to zoning regulations. (Doc. No. 317, Exh. K, Weiland Decl., ¶ 24). However, Weiland alleges he would have conducted shows at other properties had he been able to obtain entry into the Relevant Market (Doc. No. 317, Exh. K, Weiland Decl., ¶ 25).

Plaintiff Gallagher ("Gallagher") conducted both A-Rated and unrated shows in the Tallahassee area. (Doc. No. 317, Exh. O, Gallagher Decl. ¶ ¶ 8—10). Gallagher alleges he has experience developing an equestrian facility in the Tallahassee area and has been approached about developing additional facilities and "residential communities surrounding them." (Doc. No. 317, Exh. O, Gallagher Decl. ¶ 11). Gallagher also has attempted to promote A-Rated Shows in the Relevant Market, but has been unable to obtain dates for A-Rated Shows in the Relevant Market due to the application of the Mileage Rule by the NGB and Gallaher's inability to obtain waivers from the Promoter Defendants who controlled the dates. (Doc. No. 317, Exh. O, Gallagher Decl., ¶ ¶ 12 and 13). Gallagher alleges that he has the financial backing needed to promote and manage A-Rated Shows. (Doc. No. 317, Exh. O, Gallagher Decl., ¶ 14).

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[11] The Court notes that it is unclear from the record whether Weiland held six A-Rated Shows each summer or in total.

The Burton Defendants conduct A-Rated Shows. (Doc. No. 291, Exh. A., Burton, Sr. Dep. Vol. I p. 141; Exb. B., Burton, Jr. Dep. p. 113). None of the Burton Defendants were involved in the adoption of the Mileage Rule or related rules. (Doc. No. 291, Exh. A, Burton, Sr. Dep. Vol. II pp. 12 -13; Exh. B., Burton, Jr. Dep. p. 130). Cypress Trails Farm[12] unsuccessfully sought waivers of the Mileage Rule from each of the Burton Defendants. (Doc. No. 291). Gallagher unsuccessfully sought waivers of the Mileage Rule from each of the Burton Defendants. (Doc. No. 291). The decisions by each of the Burton Defendants not to grant waivers of the Mileage Rule were unilateral decisions. (Doc. No. 291, Exh. A, Burton, Sr. Dep. Vol. II pp. 52-68 and 77-79; Exh. B, Burton, Jr. Dep. pp. 186—197).

*5 Defendant Thomas E. Struzzieri ("Struzzieri") is the sole owner of Horse Shows in the Sun, Inc. ("HITS") and Rose View Stables, Ltd. ("Rose View Stables")(collectively "the HITS Defendants"). (Doc. No. 286, Struzzieri Decl., ¶ 2). From 1998 through late 2002, Struzzieri was a member of the board of directors of USAE. He was one of approximately 64 board members. (Doc. No. 286, Struzzieri Decl., ¶ 11). In January 2005, Struzzieri became a board member of USEF. (Doc. No. 289, Long Decl., ¶ 13). From 1990 to the present, Struzzieri has been a member of the Competition Management Committee for USAE and USEF. (Doc. No. 286, Struzzieri Decl., ¶ ¶ 12 and 14).

Since 1981 the HITS Defendants have been holding and promoting horse shows throughout the United States, including shows in California, Arizona, Florida, New York, Virginia and Massachusetts. (Doc. No. 286, Struzzieri Decl., ¶ 2). For each of the last three (3) years, the HITS Defendants have held seven (7) hunter/jumper shows in the state of Florida at a facility in Ocala, Florida. Of these

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[12] JES d/b/a Cypress Trails Farm.

seven (7) shows, five (5) were A-Rated Shows held on consecutive weeks in February and March. The other two (2) horse shows were "unrated" hunter/jumper shows held in January. (Doc. No. 286, Struzzieri Decl., ¶ 5). Except for the five (5) week period during the months of February and March, the HITS Defendants do not hold any USEF sanctioned horse shows in the state of Florida.

In 2003, the HITS Defendants received a Mileage Rule waiver request from Weiland, on behalf of JES.[13] This was the first request for a waiver that the HITS Defendants had ever received from JES. (Doc. No. 286, Struzzieri Decl., ¶ 7). JES failed to provide the HITS Defendants with specific details regarding the location of the contemplated show, and the waivers were not only for 2004 but for all years thereafter; therefore, the HITS Defendants did not provide JES with the waiver of the Mileage Rule. (Doc. No. 286, Struzzieri Decl, ¶ 7). The HITS Defendants received a similar request from Gallagher and similarly did not provide Gallagher with the waiver. (Doc. No. 286, Struzzieri Decl., ¶ 8). In 2004, the HITS Defendants again received waiver requests from Plaintiffs for show dates in February and March of 2005. The HITS Defendants again decided not to grant such requests based upon the fact that the Plaintiffs had filed this lawsuit against the HITS Defendants (Doc. No. 286, Struzzieri Decl., ¶ 17).

Defendant Stadium Jumping first received a Mileage Rule waiver request from JES in May 2003.[14] (Doc. No.

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[13] The dates that were subject to JES' request were February 4-8, 2004, February 11—15, 2004, February 18—22, 2004, February 25—29, 2004, March 3-7, 2004 and March 10—14, 2004. (Doc. No. 286, Struzzieri Decl., ¶ 7).

[14] The dates that were subject to JES' request were February 5-9, 2003, February 12—16, 2003, February 19—23, 2004, February

(continued...)

293, Mische Decl., ¶ 2). On May 12, 2003, Defendant Stadium Jumping responded to JES by denying JES' waiver request. (Doc. No. 293, Mische Decl., ¶ 3). Defendant Stadium Jumping elected not to respond to subsequent waiver requests received from JES. (Doc. No. 293, Mische Decl., ¶ ¶ 6, 9 and 12). Defendant Stadium Jumping received similar requests from Gallagher and similarly did not provide Gallagher with waivers or respond to his requests. (Doc. No. 293, Mische Decl., ¶ ¶ 8, 9 and 12). Defendant Stadium Jumping's decisions not to grant waivers of the Mileage Rule, or respond to Plaintiffs' requests, were unilateral decisions. (Doc. No. 293, Mische Decl., ¶ ¶ 4,6,9, and 12).

*6 Defendant Eugene R. Mische ("Mische") personally, or in the name of Defendant Stadium Jumping, has been a member of USEF and its predecessor organizations for more than thirty (30) years. Mische states that other than a *de minimis* role based on his being a member of USEF, he had no actual role in the institution or development of the Mileage Rule. (Doc. No. 293, Mische Decl., ¶ 13). Mische further claims that in the past, Defendant Stadium Jumping has granted Mileage Rule waivers to promoters, including Defendant Horse Shows in the Sun and Defendant Burtons & Sons, Inc. These waivers "were granted by Stadium Jumping without being conditioned on giving, or not giving, any future 'waivers' or permissions to those promoters or any other promoters who might make such requests in the future." (Doc. No. 293, Mische Decl., ¶ 14).

The Promoter Defendants do not control or dictate USEF policies and rules. (Doc. No. 289, Exh.1, Long Decl., ¶ 15

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[14] (...continued)
26—March 3, 2003, March 5-9, 2003, March 13—16, 2003, March 19—23, 2003 and March 25—29, 2004 (Doc. No. 293, Mische Decl., Exh. A).

and Doc. No. 293, Mische Decl., ¶ 15). Rather, the power to make and change USEF rules is placed by USEF's bylaws with USEF's fifty-four member Board of Directors. (Doc. No. 305, pp. ix—x). Of the fifty-four Board of Directors members, only ten (two of whom are athlete seats mandated by the Amateur Sports Act), represent the hunter and/or jumper communities. (Doc. No. 305, pp. x—xi and Doc. No. 289, Long Decl., ¶ 13). Only Defendant Struzzieri is currently a board member of USEF. (Doc. No 289, Long. Decl., ¶ 13). Furthermore, USEF committees, such as the Competition Management committee, have no power to make or change USEF rules but can only make recommendations for rule changes to the Board of Directors. (Doc. No. 305, p. xxix; Doc. No. 289, Long Decl., ¶ 14 and Doc. No. 286, Struzzieri Decl., ¶ 14).

III. Standard of Review

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party bears the initial burden of showing the Court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). A moving party discharges its burden on a motion for summary judgment by "showing" or "pointing out" to the Court that there is an absence of evidence to support the non-moving party's case. *Id. at 325.* Rule 56 permits the moving party to discharge its burden with or without supporting affidavits and to move for summary judgment on the case as a whole or on any claim. *See id.* When a moving party has discharged its burden, the non-moving party must then "go beyond the pleadings," and by its own affidavits, or by

"depositions, answers to interrogatories, and admissions on file," designate specific facts showing there is a genuine issue for trial. *Id.* at 324.

*7 In determining whether the moving party has met its burden of establishing that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law, the Court must draw inferences from the evidence in the light most favorable to the non-movant and resolve all reasonable doubts in that party's favor. *See Samples on behalf of Samples v. City of Atlanta,* 846 F.2d 1328, 1330 (11th Cir.1988). The Eleventh Circuit has explained the reasonableness standard:

> In deciding whether an inference is reasonable, the Court must "cull the universe of possible inferences from the facts established by weighing each against the abstract standard of reasonableness." [citation omitted]. The opposing party's inferences need not be more probable than those inferences in favor of the movant to create a factual dispute, so long as they reasonably may be drawn from the facts. When more than one inference reasonably can be drawn, it is for the trier of fact to determine the proper one.

WSB-TV v. Lee, 842 F.2d 1266, 1270 (11th Cir.1988).

Thus, if a reasonable fact finder evaluating the evidence could draw more than one inference from the facts, and if that inference introduces a genuine issue of material fact, then the court should not grant the summary judgment motion. *See Augusta Iron & Steel Works v. Employers Ins. of Wausau,* 835 F.2d 855, 856 (11th Cir.1988). A dispute about a material fact is "genuine" if the "evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it

is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52.

IV. Discussion

The question before this Court is whether there are grounds for relief under the antitrust laws based upon the alleged anticompetitive impact of the Promoter Defendants' adherence to the rules promulgated by the national governing body of equestrian sport in the United States. Plaintiffs have asserted claims against the Promoter Defendants and USEF based upon Plaintiffs' inability to obtain permission to hold or promote A-Rated Shows in Florida between December 1 and March 31. The crux of Plaintiffs' claims is that the Promoter Defendants illegally use USEF's rules to insulate themselves from economic competition in the horse show industry. Specifically, as a result of the Promoter Defendants' adherence to USEF's rules, Plaintiffs argue that "at least one incumbent promoter of an A-Rated Show exists for every winter weekend in Florida, preventing any other promoters from entering the market and engaging in head-to-head competition within the 250-mile radius" (Doc. No. 317). By way of example, Plaintiffs contend that "the 250 mile radius prevents A-Rated Shows from being held in the Tampa, Orlando or Jacksonville metro areas if a similar show is being held in the Palm Beach County area, unless the incumbent promoter grants a waiver" (Doc. No. 317). Plaintiffs refer to the Promoter Defendants' alleged illegal conduct as granting them "perfect and permanent serial monopolies for their protected dates" (Doc. No. 317).

1. Ted Stevens Olympics and Amateur Sports Act, 36 U.S.C. § § 220501 et seq.

*8 USEF argues that it is exempt from antitrust liability for the subject Mileage Rule under the Ted Stevens Olympics and Amateur Sports Act, 36 U.S.C. § § 220501 et seq. (the "Amateur Sports Act" or "ASA"). The Promoter Defendants all contend that since USEF enjoys antitrust implied immunity in connection with the establishment and enforcement of the Mileage Rule, they should likewise be immune from antitrust liability for exercising their right not to waive the application of the rule. Plaintiffs respond that there is no support in the case law for such an expansive view of implied antitrust immunity. Plaintiffs further contend that while USEF may be the NGB for equestrian sport, the Mileage Rule is not necessary for any of the core functions of the NGB and serves no legitimate purpose.

The Amateur Sports Act was enacted "to correct the disorganization and serious factional disputes that seemed to plague amateur sports in the United States." *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm'n,* 483 U.S. 522, 544, 107 S.Ct. 2971, 97 L.Ed.2d 427 (1987) (citations omitted). Under the Amateur Sports Act, the United States Olympic Commission ("USOC") is authorized to recognize one NGB for each sport included in the program of the Olympic Games. As the recognized NBG for equestrian sport in the United States, USEF is mandated to regulate the sport. The Amateur Sports Act provides in relevant part:

(a) Authority.—For the sport that it governs, a national governing body may—

(1) represent the United States in the appropriate international sport federation;

(2) establish national goals and encourage the attainment of those goals;

(3) serve as the coordinating body for amateur athletic activity in the United States; . . .

(6) recommend to the corporation [15] individuals and teams to represent the United States in the Olympic Games. . . .

36 U.S.C. § 220523.

For the sport that it governs, a national governing body shall—

(1) develop interest and participation throughout the United States and be responsible to the persons and amateur sports organizations it represents;

(2) minimize, through coordination with other amateur sports organizations, conflicts in the scheduling of all practices and competitions. . ..

36 U.S.C. § 220524.

To the extent that courts have considered antitrust challenges to rules defining professional sports activities, the rulemaking authorities have been given considerable discretion to achieve their sporting objectives, in the absence of any demonstrated market foreclosure. *See Brookins v. Int'l Motor Contest Ass'n,* 219 F.3d 849, 853 *(8th Cir.2000).* While the Amateur Sports Act does not expressly exempt amateur sports activities from the antitrust laws, courts have found implied antitrust immunity. *See Behagen v. Amateur Basketball Ass'n of the United States,* 884 F.2d 524 (1989). USEF argues that because § 220524(2) of the Amateur Sports Act confers on USEF an obligation to minimize scheduling conflicts,

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[15] The USOC.

USEF is entitled to antitrust immunity with respect to the Mileage Rule. This Court Agrees.

*9 In *Behagen*, a former amateur basketball player, Ronald Behagen ("Behagen") lost his amateur eligibility status[16] after playing professional basketball for a second time. The ABA/USA, the NGB for basketball, had enacted a player eligibility rule that provided that an athlete could reclaim amateur status only once after playing professional basketball. When Behagen's amateur status was not reinstated, he brought suit alleging in part that the player eligibility rule constituted an illegal group boycott under section 1 of the Sherman Antitrust Act ("Sherman Act"). *See Behagen*, 884 F.2d at 527. The Tenth Circuit reversed a jury verdict in favor of Behagen on the Sherman Act claim. In finding the player eligibility rule exempt from the coverage of the federal antitrust laws, the Court stated "[t]he defendants' actions in this case were clearly within the scope of activity directed by Congress, and were necessary to implement Congress' intent with regard to the governance of amateur athletics." *Id.* The Court further stated that "the monolithic control exerted by an NGB over its amateur sport is a direct result of the congressional intent expressed in the Amateur Sports Act." *Id.* at 528.

As the NGB for equestrian sport in the United States, USEF performs many functions including the promulgation of scheduling and competition rules such as are at issue in the present case. The Amateur Sports Act requires USEF, as the NGB for equestrian sport, to coordinate amateur equestrian activity in the United States and to

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[16] In order for an American to play basketball in amateur competition outside of the United States, the player is required to qualify as an amateur by receiving a travel permit from the Amateur Basketball Association of the United States ("ABA/USA") and a license from the Federation Internationale de Basketball Amateur ("FIBA")

minimize scheduling conflicts. *See* 36 U.S.C. § § 220524(2) and 220523(a)(3). Plaintiffs concede that USEF promotes the equestrian sport, including the publication of rules and standards for participation, rider and animal safety and judging at competitive shows. Third Am. Compl. ¶ 35. At the very heart of Plaintiffs' lawsuit is their desire to have A-Rated Shows in the Relevant Market sanctioned by USEF and have the ability to utilize the rules of USEF.

Scheduling is central to the governing of any sport. USEF argues that "the Mileage Rule is a scheduling rule that minimizes conflicts between recognized competitions." (Doc. No. 288). USEF further contends that use of mileage as a calender coordinating means, especially where horses are concerned, "is a very good and objective way of doing it." (Doc. No. 289, Exh. 5, Balch Dep., pp. 83—84). Plaintiffs do not dispute that the Mileage Rule minimizes scheduling conflicts between competitions, rather, Plaintiffs contend that the Mileage Rule has anticompetitive effects. However, USEF's Mileage Rule and its enforcement thereof, is exactly the type of action which the Amateur Sports Act directs, that is, "the monolithic control of an amateur sport by the NGB for that sport." *Id.* at 529.

In *Eleven Line Inc. v. North Texas State Soccer Ass'n*, 213 F.3d 198 (5th Cir.2000), one of the few cases examining antitrust liability under the Amateur Sports Act, the Court rejected the application of the implied immunity doctrine and distinguished the facts of the case from *Behagen*. However the *Eleven Line* court based its rejection in large part upon the fact that the United States Soccer Federation ("USSF"), the national governing body, had not issued the rule in question or explicitly approved of it. The *Eleven Line* court acknowledged that "[a]lthough the facts of this case do not support an implied exemption from the antitrust laws, an implied exemption would be appropriate in many other situations." *Eleven Line*, 213 F.3d at 204. In

the case before this Court, USEF as the national governing body of equestrian sport, specifically approved of the Mileage Rule and was aware of its consequences, i.e., that it may preclude a promoter from obtaining a Recognized Competition on a desired date.

***10** Plaintiffs urge this Court to consider the history of the Mileage Rule, and its waiver provision,[17] to determine if there might be a less exclusionary means to carry out the scheduling purpose of the Amateur Sports Act. This approach ignores the existing federal case law on implied immunity under the Amateur Sports Act which acknowledges that a national governing body may exert monolithic control, i.e., *Behagen* and *Eleven Line*. This Court finds that like the player eligibility rule exempted under *Behagen*, the Mileage Rule should be exempted and Plaintiffs' antitrust claims against USEF should be barred since USEF's Mileage Rule minimizes scheduling conflicts and implements Congress' intent with regard to the governance of amateur athletics. Likewise, Plaintiffs' claims against the Promoter Defendants are barred based upon their membership in USEF and/or conduct in compliance with, and pursuant to, the rules and regulations of USEF. In summary, Defendants are entitled to summary judgment on all of Plaintiffs' claims under the doctrine of implied immunity.

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[17] With respect to Plaintiffs' argument that the Mileage Rule does not minimize scheduling conflicts since it permits a promoter to "waive" a mileage conflict, this Court notes that under the January 2005 rule changes, USEF has ultimate control over all waivers (Doc. No. 289, Exh. 1, Long Decl., Exh. C thereto). Furthermore, to the extent Plaintiffs argue that under the January 2005 rule changes, the only modification is that USEF must give prior approval to "the incumbent promoters' veto power," this bolsters the presumption that the Mileage Rule is necessary. Specifically, incumbent promoters may not "dispense" with the Mileage Rule simply because it suits their purposes.

2. Standing

The HITS Defendants and Stadium Jumping Defendants contend[18] that Plaintiffs lack standing to bring the claims asserted in the Third Amended Complaint because they have not suffered the type of injury to business or property contemplated by the Sherman Act. Plaintiff JES[19] responds that it does have standing since it "attempted to enter the Relevant Market for many years" and that "each attempt was precluded by application of the Mileage Rule." Standing is a question of law for the Court to decide. *See Todorov v. DCH Healthcare Authority*, 921 F.2d 1438, 1448 (11th Cir.1991). "Antitrust standing is best understood in a general sense as a search for the proper plaintiff to enforce the antitrust laws." *Id.* The Eleventh Circuit has identified a two-pronged approach to determine whether a plaintiff has antitrust standing. To be a proper party, a plaintiff must have suffered an antitrust injury and must be an efficient enforcer of the antitrust laws. *See id.* at 1449; *see also Levine v. Central Florida Medical Affiliates, Inc.*, 864 F.Supp. 1175, 1178 (M.D.Fla.1994).

a. Antitrust Injury

Antitrust injury is defined as:

> injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful. The injury should reflect anticompetitive effect either of the violation or of anticompetitive effects made possible by the violation.

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[18] The Burton defendants join in the argument.

[19] Plaintiffs' Response to Motions for Summary Judgment incorrectly states that Defendants do not challenge Plaintiff Gallagher's standing to sue.

> It should be, in short, the type of loss that the claimed violation would be likely to cause.

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977). That is, an antitrust plaintiff must show that his own injury coincides with the public detriment tending to result from the alleged violation. *See Todorov*, 921 F.2d at 1450; *see also Amey, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486, 1493 (11th Cir.1985).

*11 In the case before this Court, Gallagher seeks the profits that he claims he would have made promoting A-Rated Shows during the period within which he was precluded from conducting such shows by reason of the Mileage Rule and the Promoter Defendants' failure to waive the Mileage Rule. JES likewise seeks the profits it claims that it would have made in promoting A-Rated Shows during the period within which it was precluded from conducting such shows. Additionally, JES and Gallagher seek the profits they claim they would have made on housing developments they would have built had they not been precluded from holding A-Rated Shows in the Relevant Market. Plaintiffs further allege that they are harmed by the Mileage Rule in that they cannot offer greater than $10,000 in prize money at the unrated shows that the Mileage Rule restricts them to in the Relevant Market.

In essence, Plaintiffs complain of injury largely to themselves not injury that inures to the public detriment. This is not antitrust injury. The antitrust laws were enacted for the protection of competition, not the competitors. *See Brunswick*, 429 U.S. at 488. In their Response to the Motions for Summary Judgment, Plaintiffs allege the Mileage Rule has caused harm to competition because it has (1) reduced the number of A-Rated Shows in the Relevant Market, (2) increased the costs of participation in

the incumbent shows, and (3) blocked potential new entrants from holding competing shows. (Doc. No. 317, Exh. R, McAnneny Expert Report, filed under seal (S-2)). There are few specific facts in the record to support these allegations, especially the allegation that the Mileage Rule has increased the costs of participation in the incumbent shows. *See Evers v. General Motors Corp.*, 770 F.2d 984, 986 (11th Cir.1985). Furthermore, the only examples of "potential new entrants" who have been blocked from holding competing shows are the Plaintiffs themselves. Lastly, while arguably the application of the Mileage Rule may have limited the number of A-Rated Shows in the Relevant Market, it is undisputed that there were at least 26 A-Rated Shows in the Relevant Market in 2004. (Doc. No. 317, Exh. R, McAnneny Expert Report, filed under seal (S-2)).

Furthermore, Plaintiffs allege damages equal to the profits they would have garnered had they been able to share in the Promoter Defendants' alleged monopoly profits. This is not antitrust injury. *See Todorov,* 921 F.2d at 1453. Lastly, as to Plaintiffs' contention that they are entitled to profits they claim they would have made on housing developments, these damages are simply too remote and speculative to serve as a basis for any antitrust injury. In summary, since Plaintiffs have not shown they suffered antitrust injury, they have no standing to assert their claims.

b. Efficient Enforcement of Antitrust Laws

To establish that it is an efficient enforcer of the antitrust laws, a plaintiff must meet the target area test. "The target area test requires that an antitrust plaintiff both 'prove that he is within the sector of the economy endangered by a breakdown of competitive conditions in a particular industry' and that he is 'the target against

which anticompetitive activity is directed." *Florida Seed Co. v. Monsanto Co.*, 105 F.3d 1372, 1374 (11th Cir.1997)(quoting *National Indep. Theatre Exhibitors, Inc. v. Buena Vista Distribution Co.*, 748 F.2d 602, 608 (11th Cir.1984)).

***12** Since the Court has found that Plaintiffs suffered no antitrust injury, it need not and will not address whether Plaintiffs would be efficient enforcers of the antitrust laws under the second prong of the standing analysis.

3. Section 1 of the Sherman Act, 15 U.S.C. § 1 (Count I)

Section 1 of the Sherman Act provides, in pertinent part, that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal." 15 U.S.C. § 1. Broadly speaking, irrespective of the type of activity challenged, certain elements must be established to prove a violation of section 1:(1) that an agreement exists between two or more entities and (2) that the agreement unreasonably restrains trade. *See Torodov*, 921 F.2d at 1455; *see also Boczar v. Manatee Hospitals & Health Systems, Inc.*, 731 F.Supp. 1042, 1046 (M.D.Fla.1990); *Weight-Rite Golf Corporation, et al. v. United States Golf Association*, 766 F.Supp. 1104, 1108 (M.D.Fla.1991); *Tucci v. Smoothie King Franchises, Inc.*, 215 F.Supp.2d 1295, 1301 (M.D.Fla.2002). As discussed below, the Court finds that Plaintiffs have failed to establish either of the elements necessary to prove a violation of section 1 of the Sherman Act.

a. Contract, Combination or Conspiracy

The threshold element of a section 1 claim is "concerted activity." Mere unilateral conduct is not violative of section

1. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984); *see also Levine*, 72 F.3d at 1545. Section 1 of the Sherman Act does not prohibit independent business decisions but only prohibits concerted action and, thus, requires some agreement, express or implied, between two or more persons. *See Moecker v. Honeywell Int'l, Inc.*, 144 F.Supp.2d 1291, 1300 (M.D.Fla.2001)(citing *Monsanto Co. v. Spray-Rite Serv. Corp.* ., 465 U.S. 752, 761, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984)). It is well settled in the Eleventh Circuit that evidence of parallel business behavior, or even conscious parallelism, does not without more,[20]constitute concerted activity. *See City of Tuscaloosa v. Harcros Chemicals, Inc.*, 158 F.3d 548, 570 (11th Cir.1998).

The Promoter Defendants claim that Plaintiffs cannot demonstrate that the Promoter Defendants acted collusively in refusing to grant Plaintiffs' requests for waiver of the Mileage Rule. The Court agrees that there is no record evidence that the Promoter Defendants' refusals to waive the Mileage Rule as to Plaintiffs' proposed A-Rated Shows were anything other than unilateral acts. "The threshold requirement of every conspiracy claim, under both section 1 and section 2, is an agreement to restrain trade. To prove that such an agreement exists between two or more persons, a plaintiff must demonstrate 'a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.' " *Seagood Trading Corp. v. Jerrico, Inc.*, 924 F.2d 1555, 1573 (11th Cir.1991)(quoting *American Tobacco Co. v. United States*, 328 U.S. 781, 810, 66 S.Ct. 1125, 90 L.Ed. 1575 (1946)). This Court recognizes that it will only be the rare case in which a plaintiff can establish the existence of a conspiracy

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[20] At times referred to as "plus factors."

by showing an explicit agreement and that most conspiracies are inferred "from the behavior of the alleged conspirators." *See id.* However, antitrust law limits the range of permissible inferences from circumstantial or ambiguous evidence in a section 1 case. *See City of Tuscaloosa,* 158 F.3d at 570. To prove a conspiracy, the circumstantial evidence must reasonably tend to exclude the possibility that the alleged conspirators acted independently. *See Seagood,* 924 F.2d at 1574.

*13 With respect to Plaintiffs' contention that the record is "replete" with evidence of written agreements between the HITS Defendants and Stadium Jumping Defendants in which these Promoter Defendants continually agree to grant each other waivers of the Mileage Rule, this Court cannot infer from these agreements any conspiracy or "meeting of the mind" to exclude Plaintiffs from promoting A-Rated Shows in the Relevant Market. Plaintiffs further contend that the NGB "held up their end of the bargain," and participated in the purported conspiracy, by assisting these Promoter Defendants over the years in the implementation of their agreement and denying any conflicting date applications from other promoters pursuant to the Mileage Rule. (Doc. No. 317). However, Plaintiffs concede that the Stadium Jumping Defendants have from time to time granted Mileage Rule waivers to other longstanding horse show promoters in the Relevant Market. (Doc. No. 317, Exh. C). Plaintiffs further concede that "there is no direct evidence of collusion" among the HITS Defendants and Stadium Jumping Defendants in reaching their specific decisions to deny the Plaintiffs' waiver requests. (Doc. No. 317).

Here the evidence Plaintiffs rely upon for the proposition that this Court should infer a conspiracy only demonstrates that the HITS Defendants and the Stadium Jumping Defendants chose to do business with one another. Furthermore, the evidence establishes that over the

years the Stadium Jumping Defendants apparently opted to do business with Kernan Hodges and at least one of the Burton Defendants. As to the Promoter Defendants, "[i]t is well established that a party 'may choose with whom he will do business and with whom he will not do business' and that this behavior referred to as 'exclusive dealing,' will not give rise to liability absent a showing of actual competitive injury." *See Seagood,* 924 F.2d at 1567 (citing *Construction Aggregate Transp., Inc. v. Florida Rock Indus., Inc.,* 710 F.2d 752, 772-73 (1983)). Additionally, the conduct of the NGB amounts to little more than enforcing its own rules and minimizing scheduling conflicts as it is required to do.

Here Plaintiffs have presented no credible evidence by which this Court could find a conspiracy. Circumstantial evidence in this case is insufficient to implicate the Promoter Defendants in an agreement to exclude Plaintiffs from promotion of A-Rated Shows in the Relevant Market. This is especially true since each Promoter Defendant, at most, admittedly only has control of a limited number of weekend dates in the alleged Relevant Market and has no control over the remaining dates. Furthermore, in denying the Plaintiffs' waiver requests, the Promoter Defendants complied with the rules of the NGB. Therefore, an agreement between the Defendants has not been established.

b. Unreasonable Restraint of Trade

Even if Plaintiffs were able to demonstrate concerted activity on the part of Defendants, not every agreement that restrains competition will violate the Sherman Act. The Supreme Court has determined that section 1 prohibits only those agreements that *unreasonably* restrain competition. *See National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma,* 468 U.S. 85, 98, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984); *see also Levine.,*

72 F.3d at 1545 (citing *Standard Oil Co. v. United States,* 221 U.S. 1, 58 -64, 31 S.Ct. 502, 55 L.Ed. 619 (1911)). To determine whether an agreement unreasonably restrains trade, courts have applied the rule of reason analysis and the *per se* analysis. *See Boczar,* 731 F.Supp. at 1046. That is, "[a] restraint may be violative of the Sherman Act because it is solely a naked restraint of trade so offensive to competition as to be unreasonable *per se,* or because it runs afoul of the more detailed rule of reason inquiry." *Retina Associates, P.A. v. Southern Baptist Hospital of Florida et al.,* 105 F.3d 1376, 1381 (11th Cir.1997)(citing *F.T.C. v. Indiana Fed'n of Dentists,* 476 U.S. 447, 458, 106 S.Ct. 2009, 90 L.Ed.2d 445 (1986)). Plaintiffs contend that the application of the Mileage Rule by the Promoter Defendants as members of the NGB, in failing to grant waiver requests to the Plaintiffs, requires this Court to undertake a *per se* analysis. This Court disagrees and finds the rule of reason analysis is applicable to Plaintiffs' claims.

i. Is the Mileage Rule *Per Se* Unreasonable?

*14 Per se illegality is limited to four categories of trade restraints: (1) horizontal and vertical price fixing; (2) horizontal market divisions; (3) group boycotts or concerted refusals to deal; and (4) tying arrangements. *See Moecker,* 144 F.Supp.2d at 1301 (citing *Seagood Trading,* 924 F.2d at 1567). Plaintiffs allege that through the use of the Federation's prize level restriction within the Mileage Rule, Defendants have fixed, depressed and standardized the amount of money that may be awarded at Recognized Horse Shows resulting in illegal price-fixing that is a per se violation of section 1. Third Am. Compl. ¶ 203. Plaintiffs also allege that the agreement of the Promoter Defendants to enforce the Mileage Rule is a horizontal allocation of markets that is a per se violation of section 1. Third Am.

Compl. ¶ 204. Plaintiffs further allege that "the activity of the Defendants to cause the Federation to deny permission to Plaintiffs to compete in the Relevant Market constitutes an illegal boycott that is a per se violation" of section 1. Third Am. Compl. ¶ 205.

However, in the Eleventh Circuit, "[t]he presumption in cases brought under section 1 of the Sherman Act is that the rule-of-reason standard applies." *Seagood*, 924 F.2d at 1567. Furthermore, there is substantial case law rejecting a *per se* approach in examining the action taken by sporting associations. *See NCAA*, 468 U.S. at 100-01; *see also Cha-Car, Inc. v. Calder Race Course, Inc.*, 752 F.2d 609, 613 (11th Cir.1985); *Hatley v. American Quarter Horse Ass'n*, 552 F.2d 646, 652-53 (5th Cir.1977).; *Martin v. American Kennel Club, Inc.*, 697 F.Supp. 997, 1000 (N.D.Ill.1988). Since under a *per se* analysis there is no inquiry into possible justifications for the challenged restraint, the *per se* doctrine should not be extended to restraints that are of ambiguous effect. *See Cha-Car*, 752 F.2d at 612-13.

"The decision to apply the *per se* rule turns on 'whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output." *Northwest Wholesale Stationers, Inc. v. Pacific Stationary & Printing Co.*, 472 U.S. 284, 289-90, 105 S.Ct. 2613, 86 L.Ed.2d 202 (1985)(quoting *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.* 441 U.S. 1, 19-20, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979)). The Mileage Rule as promulgated by USEF, including its prize money requirement, and application thereof by the Promoter Defendants, is not a practice which facially appears to be one that would always or almost always tend to restrict competition.

Therefore, the Court finds that Plaintiffs have failed to establish *per se* violations of the Sherman Act and a "rule

of reason" analysis should be applied. Specifically, despite Plaintiffs' efforts to couch Defendants' conduct in terms of traditionally per se illegal activities, the field of sports is one "in which horizontal restraints on competition are essential if the product is to be available at all." *See NCAA,* 468 U.S. at 101. That is, the self-regulation which is present here by virtue of the operation of the NGB for equestrian sport exempts Defendants' conduct from *per se* analysis. *See Cha-Car,* 752 F.2d at 614 n. 9.

ii. Is the Mileage Rule Unreasonable Under the Rule of Reason?

***15** "Under Eleventh Circuit case law, alleged Section One agreements analyzed under the rule of reason require a plaintiff 'to prove (1) the anticompetitive effect of the defendant's conduct on the relevant market, and (2) that the defendant's conduct had no pro-competitive benefit or justification.' ' *Spanish Broadcasting System of Florida, Inc. v. Clear Channel Communications, Inc.*,376 F.3d 1065, 1071 (11th Cir.2004) (quoting *Levine,* 72 F.3d at 1551)); *see also Retina Associates,* 105 F.3d at 1383 (requires proof that defendant's conduct had an anticompetitive effect in the relevant market, either by establishing actual anticompetitive effect or potential for genuine anticompetitive effect in defined geographic and product markets, and that no pro-competitive rationale would justify conduct).

The burden of proving an unjustified anticompetitive effect is on the Plaintiffs. *See Seagood,* 924 at 1570. However, since the Defendants do not specifically address whether the alleged violative conduct has restrained competition in the Relevant Market, for purposes of its rule of reason analysis, this Court will presume without finding that Plaintiffs have demonstrated an anticompetitive effect in the Relevant Market. The Court

must then determine whether the Defendants' conduct had any pro-competitive benefit or justification. At the heart of this inquiry is the Mileage Rule itself.

Under the rule of reason analysis, this Court must evaluate the challenged rule in light of the factual context of the particular industry, the history of the restraint, and the reason for its imposition[21] in order to determine whether its anticompetitive effects outweigh its pro-competitive benefits. *See National Society of Professional Engineers v. United States,* 435 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978); *see also Cooney v. American Horse Shows Ass'n,* 495 F.Supp. 424, 431 (S.D.N.Y.1980). The record before this Court demonstrates the reasonableness of the Mileage Rule.

Plaintiffs suggest that the Mileage Rule has no purpose other than to effect some sort of elaborate scheme whereby they are precluded from acquiring their desired dates to promote A-Rated Shows in the Relevant Market. Specifically, Plaintiffs contend "[t]he Mileage Rule has no purpose other than to insure that incumbent promoters of shows covered by the Mileage Rule do not face any competition within a 250 mile radius, unless they are willing in the exercise of their unfettered discretion to tolerate a new entrant by granting a waiver from the Mileage Rule's monopoly grant." Plaintiffs' assertion is not supported by the evidence before this Court.

The Mileage Rule has several pro-competitive functions relating to equestrian sport. As discussed above, the Mileage Rule is an effective way to minimize scheduling conflicts. USEF's Mission Statement states, in relevant part:

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[21] There is no evidence before this Court as to why the Mileage Rule was originally implemented.

> As the National Governing Body (NGB) of Equestrian Sport in the United States we will inspire, encourage interest in, and regulate equestrian competition by ensuring the safety and well-being of the horses . . . promote the pursuit of excellence in equestrian sport from junior and grass roots programs to Olympic Games . . . [t]o accomplish this mission, our members and staff, working together will:

***16** (3) Protect and support the welfare of horses by inspecting, monitoring and testing to deter use of forbidden substances and other cruel, unsafe and/or unsportsmanlike practices and by adopting and enforcing rules to prohibit such practices . . .

(6) Provide the strongest possible U.S. representation internationally . . .

(12) Serve as the coordinating body for equestrian activity in the United States . . .

(13) Coordinate the calender of competitions . . . and provide for varying levels of regional and national competition in a wide variety of disciplines to increase the breadth and depth of the sport throughout the country. . ..

(Doc. No. 305, pp. i-ii). The Mileage Rule aids USEF in ensuring horses and United States athletes can compete at the highest levels both in the United States and internationally. Specifically, the Mileage Rule disperses hunter and jumper competitions geographically, thereby making it more likely that the best athletes and horses will compete against one another. (Doc. No. 289, Exh. 2, O'Connor Decl., ¶ 6, Doc. No. 289, Exh. 5, Balch Dep., pp. 111—112 and Doc. No. 289, Exh. 4, Long Dep., pp. 64—65). A-Rated Shows attract the best athletes and horses. However, not a large number of horses and athletes can compete at the highest levels. If there were numerous A-Rated Shows in close geographic proximity on the same

days, as might occur without the Mileage Rule, it is less likely that the best horses and athletes would compete against each other as the top horses and athletes would instead be dispersed among those A-Rated Shows. (Doc. No. 289, Exh. 2, O'Connor Decl., ¶ 6).

Furthermore, the Mileage Rule promotes the health and welfare of the horses by removing incentives for horse owners to overuse their horses by chasing "points" and prize money on the same or proximate days at multiple competitions in the same geographic area. (Doc. No. 289, Exh. 2, O'Connor Decl., ¶ 7, Doc. No. 289, Exh. 5, Balch Dep., pp. 112—113, 133—137 and Doc. No. 289, Exh. 3, O'Connor Dep., pp. 51—52). Lastly, the Mileage Rule aids USEF in fostering the development of equestrian sport across the United States, not just in former regional centers such as the Northeast. (Doc. No. 289, Exh. 5, Balch Dep., p. 111).

USEF, as the NGB for equestrian sport, utilizes the Mileage Rule to achieve several pro-competitive functions. There is no evidence in the record that in denying the Plaintiffs' waiver requests, the Promoter Defendants as members did any more than abide by USEF's rules in operating their respective horse shows. Furthermore, under the January 2005 rule changes, the Promoter Defendants will not have "unfettered discretion" to waive the Mileage Rule because USEF "shall determine whether it is in the best interest of the sport to either deny or grant the waiver and under what terms and conditions such waiver shall be given." (Doc. No. 344, Exh. A, GR213). Therefore, applying the rule of reason, the Court finds that under the facts of this case the Mileage Rule does not result in an unreasonable restraint of trade.

4. Section 2 of the Sherman Act, 15 U.S.C. § 2 (Counts II—IV)

*17 Section 2 of the Sherman Act is directed against "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States." 15 U.S.C. § 2. Broadly speaking, there are three distinct violations actionable under section 2 of the Sherman Act: (1) monopolization; (2) attempt to monopolize; and (3) conspiracy to monopolize. In their Third Amended Complaint, Plaintiffs allege all three violations.

As an initial matter under the Court's section 2 analysis, USEF argues that it is entitled to summary judgment on Counts II—IV, as well as the related Florida state law claims (Counts VI, VII, VII, and IX (in part)), since it is not a competitor in the relevant market and because Plaintiffs' "shared monopoly" theory is unsupported by the facts and law. This Court agrees that USEF is not a competitor in the Relevant Market. According to Plaintiffs, the Relevant Market is A-Rated Shows in the state of Florida during the winter months. It is undisputed that USEF is the NGB for equestrian sport in the United States and not a horse show promoter, operator or manager in this alleged market (Doc. No. 289, Long Decl., ¶ 17). Nor is there any credible evidence in the record that the Promoter Defendants control or influence USEF. Since USEF does not compete in the Relevant Market, USEF is entitled to summary judgment on Plaintiffs' section 2 claims based upon the argument that it does not compete in the Relevant Market. *See Aquatherm Industries, Inc. v. Florida Power & Light Company,* 145 F.3d 1258, 1261 (11th Cir.1998); *see also Spanish Broadcasting System,* 376 F.3d at 1075. The Court will address Plaintiffs' "shared monopoly" theory of liability in greater detail below.

Plaintiffs claim that Defendants have used USEF's protected status as a NGB to "create a series of monopolies" in the Relevant Product Market. The Court finds that

Plaintiffs have failed to present evidentiary support for the elements of their claims for monopolization offenses under section 2 of the Sherman Act.

i. Monopolization (Count II)

To establish a claim for monopolization, plaintiffs must demonstrate that Defendants: (1) possessed monopoly power in the relevant market and (2) willfully acquired or maintained that power, as distinguished from growth or development as consequence of superior product, business, acumen, or historic accident. *See Morris Communications Corp. v. PGA Tours, Inc.*, 364 F.3d 1288, 1293-94 (11th Cir.2004)(citing *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966)). "Monopoly power" is defined as "the power to control prices or exclude competition in the relevant market." *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 391, 76 S.Ct. 994, 100 L.Ed. 1264 (1956).

Under a "shared monopoly" theory, Plaintiffs have alleged Defendants possess market power. Specifically, with respect to their monopolization claim under section 2 of the Sherman Act, Plaintiffs allege that "[t]he Federation, together with the non-Federation Defendants and/or other unnamed coconspirators, possess monopoly power in the Relevant Market due to their control over available dates for Recognized Horse Shows under the Federation Rules." Third Am. Compl. ¶ 220. The record evidence does not demonstrate that any individual Defendant had the power to control prices or exclude competition from the market. Rather, at most, the Promoter Defendants possess what Plaintiffs have termed a "perfect and permanent serial" monopoly. This is not sufficient to establish a claim for monopolization under section 2 of the Sherman Act.

*18 The Eleventh Circuit has not directly addressed whether claims based on a "shared monopoly" may consti-

tute a violation of section 2 of the Sherman Act. In October 2003, in denying the then Defendants'[22] motions to dismiss Plaintiffs' amended complaint, this Court found that "the concept of a 'shared monopoly' cannot be excluded at this juncture" (Doc. No. 59). At the summary judgment stage, however, the Court declines to accept the concept of a shared monopoly as a basis for section 2 liability under Plaintiffs' claims for monopolization and attempted monopolization. Only section 2's conspiracy to monopolize claim targets concerted action. *See Carpet Group, Int'l v. Oriental Rug Importers Ass'n,* 256 F.Supp.2d 249, 283-85 (D.N.J.2003); *see also ID Security Systems, Inc. v. Checkpoint Systems, Inc.,* 249 F.Supp.2d 622, 649 (E.D.Pa.2003).

Even if this Court were to accept the concept of a shared monopoly, Plaintiffs have failed to set forth facts sufficient to establish that USEF and the Promoter Defendants share monopoly power in the Relevant Market. Here we have a small Relevant Market, i.e., the state of Florida, in which numerous entities promote anywhere from 26 to 31 A-Rated Shows during the approximately seventeen (17) weeks that make up the winter months. There is no evidence before this Court that any of the individual Promoter Defendants expanded or combined their limited "perfect and permanent serial" monopolies to achieve market power in the Relevant Market.

ii. Attempted Monopolization (Count III)

To establish a claim for attempted monopolization, plaintiffs must demonstrate: "(1) that the defendant has

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[22] David E. Burton, Sr., David E. Burton, Jr., Burtons and Sons, Inc., Littlewood Fences, Inc., Kernan Hodges, USA Equestrian, Inc., Bob Bell, Classic Company, Ltd. and North Florida Hunter & Jumper Association, Inc.

engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan,* 506 U.S. 447, 456, 113 S.Ct. 884, 122 L.Ed.2d 247 (1993). "Anticompetitive conduct is 'the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor." ' *Convad Communications Co. v. Bellsouth Corp.,* 299 F.3d 1272, 1283 (11th Cir.2002), *vacated on other grounds,* 540 U.S. 1147, 124 S.Ct. 1143, 157 L.Ed.2d 1040 (2004),(quoting *United States v. Griffith,* 334 U.S. 100, 107, 68 S.Ct. 941, 92 L.Ed. 1236 (1848)). "Proof of the intent element requires proof of 'a specific intent to destroy competition or build a monopoly." ' *See Retina Associates,* 105 F.3d at 1385 (quoting *Times- Picayune Publishing Co. v. United States,* 345 U.S. 594, 73 S.Ct. 872, 97 L.Ed. 1277 (1953)). Plaintiffs allege that Promoter Defendants together have prevented competition from new Recognized Competitions because entities who submit timely applications to hold Recognized Competitions, accompanied by the applicable fees, do not have the same access to dates for Recognized Competitions as existing promoters and managers. The Court declines to accept the concept of a shared monopoly as a basis for section 2 liability under Plaintiffs' claim for attempted monopolization. Furthermore, Plaintiffs have failed to demonstrate that the Promoter Defendants engaged in predatory or anticompetitive conduct when they unilaterally refused to grant Plaintiffs' waiver requests. There is also insufficient evidence from which a jury could find that any of the Promoter Defendants acted with a "specific intent to monopolize" when they unilaterally opted to adhere to the USEF rules. Lastly, Plaintiffs do not point to any record evidence supporting an inference that the Promoter Defendants' unilateral conduct created a "dangerous probability" that they would succeed in achieving a monopoly.

iii. Conspiracy to Monopolize (Count IV)

***19** To establish a claim for conspiracy to monopolize, plaintiffs must prove "(1) concerted action deliberately entered into with the specific intent of achieving a monopoly; and (2) the commission of at least one act in furtherance of the conspiracy." *Moecker,* 144 F.Supp.2d. at 1310 (quoting *Todorov,* 921 F.2d at 1460 n. 5). *See also* ABA Section of Antitrust Law, Antitrust Law Developments, p. 308 (5th ed.2002); *Thompson v. Metropolitan Multi-List,* 934 F.2d 1566, 1582 (11th Cir.1991). A claim for conspiracy to monopolize does not require a showing of monopoly power. *See Levine,* 72 F.3d at 1555.

Since the most Plaintiffs can establish is that an individual promoter may have a "serial monopoly" for its protected dates, which make up only a portion of the total number of dates available for A-Rated Shows in the Relevant Market, no jury could find that an individual promoter acted with a specific intent to monopolize the Relevant Market. *See Feldman v. Jackson Mem'l Hosp.,* 571 F.Supp. 1000, 1010—11 (S.D.Fla.1983). Furthermore, as discussed above in relation to section 1, the evidence before this Court does not demonstrate that the Promoter Defendants acted in knowing concert or "conspired" when they individually refused to grant the Plaintiffs' requested waivers of the Mileage Rule.

5. Florida Antitrust Act, Fla. Stat. § § 542.18 and 542.19 (Counts V— VIII)

The Florida Antitrust Act provides that "[e]very contract, combination, or conspiracy in restraint of trade or commerce in this state is unlawful." Fla. Stat. § 542.18 (2002). Furthermore, "[i]t is unlawful for any person to monopolize, attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of trade or commerce in this state." Flat. Stat. § 542.19 (2002). "Federal and Florida antitrust laws are analyzed

under the same rules and case law." *All Care Nursing Service, Inc. v. High Tech Staffing Services, Inc.*, 135 F.3d 740, 745 n. 11 (11th Cir.1998). "[T]he Florida legislature has, in effect, adopted as the law of Florida the body of antitrust law developed by the federal courts under the Sherman Act. *St. Petersburg Yacht Charters, Inc. v. Morgan Yacht, Inc.*, 427 So.2d 1028, 1032 (Fla. 2nd DCA 1984). Therefore, for the same reasons this Court has found no violation of the Federal antitrust laws, this Court finds that Plaintiffs have failed to establish the elements of a violation of Fla. Stat. § § 542.18 and 542.19.

6. Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § § 501.201 et seq. (Count IX)

Count IX alleges violations of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"). Fla. Stat. § 501.201 et seq. FDUTPA provides that unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful. Fla. Stat. § 501.204(1). Subsection 501.203(3) provides that a violation of the Federal Trade Commission Act constitutes a violation of FDUTPA. The law also provides that in construing this provision, great weight should be given to the interpretations of the Federal Trade Commission and the federal courts relating to § 5(a)(1) of the Federal Trade Commission Act. Fla. Stat. § 501.20(2). Unquestionably, antitrust claims fall within § 5(a)(1) of the Federal Trade Commission Act. *See Indiana Fed'n of Dentists*, 476 U.S. at 454-55. Plaintiffs' FDUTPA claim is based on the same allegations as their antitrust claims.[23] Third Am. Compl. ¶ 262. Therefore, for the same

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[23] Plaintiffs concede that their FDUTPA claims "survive" or "fall" with their antitrust claims.

reasons this Court has found no violation of the Federal antitrust laws, this Court finds that Plaintiffs have failed to establish the elements of a violation of Fla. Stat. § 501.201 et seq.

IV. Conclusion

***20** The Court finds that under the facts of this case there are no grounds under which Plaintiffs are entitled to relief under the antitrust law. *See First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288—89, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968). Accordingly, it is ORDERED AND ADJUDGED that:

(1) Defendant United States Equestrian Federation, Inc.'s ("USEF") Motion for Summary Judgment (Doc. No. 287) is GRANTED. USEF's Request for Oral Argument is DENIED.

(2) Defendants', David E. Burton, Sr., David E. Burton, Jr., Burtons and Sons, Inc. and Littlewood Fences, Inc. (collectively, "the Burton Defendants"), Motion for Summary Judgment is (Doc. No. 290) is GRANTED.

(3) Defendants', Thomas Struzzieri ("Struzzieri"), Horse Shows in the Sun, Inc. ("HITS") and Rose View Stables, Ltd. ("Rose View Stables")(collectively "the HITS Defendants"), Motion for Summary Judgment (Doc. No. 292) is GRANTED.

(4) Defendants', Stadium Jumping, Inc. ("Stadium Jumping") and Eugene R. Mische ("Mische)(collectively, "the Stadium Jumping Defendants"), Motion for Entry of Final Summary Judgment (Doc. No. 294) is GRANTED.

Defendants', Stadium Jumping, Inc. ("Stadium Jumping") and Eugene R. Mische ("Mische)(collectively, "the Stadium Jumping Defendants"), Request for Oral

Argument (Doc. No. 295) is DENIED.

(5) Since the Court has found Plaintiffs' claims are barred by the Defendants' implied immunity, all claims against Defendants Linda S. Aldrich and Fox Lea Farms, Inc. shall be dismissed.

(6) The Pretrial Conference in the above-captioned matter which was previously scheduled for Friday, May 13, 2005, at 8:30 a.m. is hereby cancelled.

(7) The Clerk is directed to enter judgment in favor of Defendants United States Equestrian Federation, Inc., David E. Burton, Sr., David E. Burton, Jr., Burton and Sons, Inc., Littlewood Fences, Inc., Thomas Struzzieri, Horse Shows in the Sun, Inc., Rose View Stables, Ltd., Stadium Jumping, Inc. and Eugene R. Mische and CLOSE this case.

DONE AND ORDERED

(2)

No. 06-576

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In The

Supreme Court of the United States

JES PROPERTIES, INC.
d/b/a CYPRESS TRAILS FARM, *et al.*,

Petitioners,

v.

USA EQUESTRIAN TRUST, INC., *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION OF UNITED STATES EQUESTRIAN FEDERATION, INC.

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QUESTIONS PRESENTED

In their two Questions Presented, Petitioners posit a conflict between a hypothetical decision and, respectively, the decision in *Billing* v. *Credit Suisse First Boston Ltd.*, 426 F.3d 130 (2nd Cir. 2005), *cert. granted sub nom. Credit Suisse First Boston Ltd.* v. *Billing*, 549 U.S. ___, No. 05-1157 (Dec. 7, 2006), and three decisions of this Court. The Eleventh Circuit's decision in this case is not as characterized in the Questions Presented. Thus, Petitioners' Questions do not present any issues that would properly be before the Court if certiorari were granted.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners JES Properties, Inc. (doing business as Cypress Trails Farm) and Michael W. Gallagher were appellants and plaintiffs below. United States Equestrian Federation, Inc. ("USEF") and the other respondents named in the caption of the Petition were named as appellees and defendants in the courts below; however, among those so named, USA Equestrian, Inc. (formerly known as the American Horse Show Association, and now known as, USA Equestrian Trust, Inc.) did not participate in Petitioners' appeal, having settled and having obtained a dismissal of all claims against it in the District Court.

CORPORATE DISCLOSURE STATEMENT

United States Equestrian Federation, Inc. ("USEF") is a nongovernmental corporation. There is no parent corporation for USEF, and no publicly-traded corporation owns 10% or more of USEF's stock.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioners have requested a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case. Respondent United States Equestrian Federation, Inc. ("USEF" or "Respondent") respectfully opposes Petitioners' request.

OPINIONS BELOW

Petitioners appealed from a judgment dismissing their Sherman Act §§ 1 and 2 claims and parallel state-law claims. The District Court's final judgment and order granting summary judgment to the defendants (App. A.17-57) is unpublished. The citation for the official report of the Court of Appeals' opinion (App. A.1-16) is *JES Properties, Inc.* v. *USA Equestrian, Inc.*, 458 F.3d 1224 (11th Cir. 2006).

JURISDICTION

The Eleventh Circuit entered its opinion on August 2, 2006. Although this Court has jurisdiction pursuant to 28 U.S.C. § 1254(1), there is no compelling reason to exercise that jurisdiction to grant review in this case.

STATUTES INVOLVED

15 U.S.C. § 1 provides in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

36 U.S.C. § 220521(a) provides in relevant part: "For any sport which is included on the program of the Olympic Games, the Paralympic Games, or the Pan-American Games, the corporation [United States

Olympic Committee] is authorized to recognize as a national governing body . . . an amateur sports organization which files an application and is eligible for such recognition in accordance with the provisions of subsections (a) or (b) of section 220522. The corporation may recognize only one national governing body for each sport for which an application is made and approved. . . ."

36 U.S.C. § 220522(a) provides in relevant part: "An amateur sports organization is eligible to be recognized, or to continue to be recognized, as a national governing body only if it –

(5) demonstrates that it is autonomous in the governance of its sport, in that it –

(A) independently decides and controls all matters central to governance;

(B) does not delegate decision-making and control of matters central to governance; and

(C) is free from outside restraint; . . .

(10) demonstrates . . . that its board of directors and other such governing boards have established criteria and election procedures for and maintain among their voting members individuals who are actively engaged in amateur athletic competition in the sport for which recognition is sought or who have represented the United States in international amateur athletic competition within the preceding 10 years . . . and that the voting power held by such individuals is not less than 20 percent of the voting power held in its board of directors and other such governing boards;. . . ."

36 U.S.C. § 220524 provides in relevant part: "For the sport that it governs, a national governing body shall –

(1) develop interest and participation throughout the United States and be responsible to the persons and amateur sports organizations it represents;

(2) minimize, through coordination with other amateur sports organizations, conflicts in the scheduling of all practices and competitions; . . . ."

STATEMENT OF THE CASE

A. Equestrian Sport and its National Governing Body

Since 1978, the development and support of U.S. athletes in the Olympic and international equestrian disciplines have been committed to the oversight and regulation of a national governing body ("NGB") under the Ted Stevens Olympic and Amateur Sports Act ("the Act" or "ASA"), 36 U.S.C. §§ 220501-220529. A primary responsibility of the NGB for equestrian sport is to promote excellence in the sport generally, to ensure horses and American athletes can compete at the highest levels both in the United States and internationally, such as at the Olympic Games. (R. 289-8/2-3/6; R. 289-11/5-6/25-14)[1] Consequently, the NGB strives to provide "a framework that has the best meeting the best" in athletic competitions. (App. A.48-49; R. 289-11/6/11-14; R. 289-10/2/21-25) It also attempts to broaden interest and participation in equestrian sport, to provide a long-term base of support for excellence in elite competitions. (R. 289-11/5/6-15; *see* 36 U.S.C. § 220524(1)) In addition to protecting the safety of the human athletes, the NGB has an obligation to protect the

[1] "R." indicates a reference to the record before the Court of Appeals, including the district court document docket number, which may have subparts, plus page and paragraph numbers or line numbers as appropriate, as in "R. 317-14/7-8/15-16," indicating docket number 317, subpart 14, pages 7-8, paragraphs 15-16. The citation "App." refers to the appendix to the Petition, which consists of the decisions of the District Court and the Court of Appeals.

welfare of the horses in equestrian sport. (R. 289-8/3/7; R. 302, Bylaw 102)[2]

Until June 2004, the NGB for equestrian sport recognized by the United States Olympic Committee ("USOC") was USA Equestrian, Inc. ("USAE"), formerly known as the American Horse Show Association. (App. A.2, 21) As of June 1, 2004, USEF began performing its duties as the one and only NGB for equestrian sport. (App. A.21) Since that date, USEF has exercised the authority and borne the responsibilities and obligations of an NGB. (App. A.21) As such, it has promulgated and enforced rules regarding equestrian events, including hunter/jumper competitions. (R. 289-2/3/9-11)

In keeping with NGB eligibility requirements, *see generally*, 36 U.S.C. § 220522(a)(7), (9)-(10), membership in USEF is open to any individual who is an active participant in equestrian sport as well as to all amateur, not-for-profit organizations that conduct programs in equestrian sport; by its own bylaws, USEF membership is open to others as well. (R. 302, Bylaw 201) Its over 80,000 members across 27 breeds and disciplines include participants in athletic competitions (for example, rider-athletes, trainers, horse owners, judges, and other licensed officials), not-for-profit amateur sports organizations, and for-profit promoters like Petitioners and the other Defendants-Respondents who put on amateur competitions. (App. A.2, 21; R. 289-2/4/16; R. 302, Bylaw 201) No less than 20% of the voting power on the Board of Directors that governs USEF is held by athletes who are actively

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[2] The USEF Bylaws and the Rule Books for the 2004, 2005, and 2006 competition years are available for viewing or download through the USEF website. The respective URLs are <http://www.usef.org/content/bylaws> and <http://www.usef.org/content/rules> (last visited Dec. 18, 2006).

engaged in equestrian competition or who have represented the United States in international amateur equestrian competition within the past ten years. (App. A.2-3; R. 302, Bylaw 302(1) and 289-2/4/13); *see also* 36 U.S.C. § 220522(a)(10).

B. The NGB Competition Rules

When it became the NGB in June 2004, USEF adopted as its own the rules promulgated by USAE, to ensure that all the NGB regulatory and governance responsibilities could be and would be carried out and to maintain continuity for the 2005 competition year. (App. A.2; R. 289-2/3/9) USEF subsequently made substantive changes to the rules. (App. A.2, 23; R. 289-2/3/11) The Mileage Rule that was the subject of Petitioners' antitrust claims and is challenged in this Petition is the version of General Rule 214 that was promulgated by USAE and adopted by USEF in June 2004. (App. A.3-4, 22-23; USAE GR 214[3]) In relevant part, USAE GR 214.2 provided that the distance between recognized competitions held on the same date must be at least a "250-mile radius for competitions with any of the same A rated sections" or with jumper sections (which are unrated) "with total prize money of $10,000 or more." (App. A.22) This minimum-distance restriction applied to competitions in all 27 breeds and disciplines held throughout the United States and Canada, including recognized hunter/jumper competitions in Florida and all but certain Northeastern states.[4] (App. A.4)

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[3] USEF refers in this brief to the version of a rule promulgated by USAE and adopted by USEF in June 2004 as "USAE Rule 214" and abbreviates General Rule to "GR."

[4] Recognized hunter/jumper competitions in Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York,

(Continued on following page)

To hold a recognized competition, a promoter must secure NGB approval for the competition on particular dates at a specific location. USAE GR 210.1-.4. Under the USAE rules, such approval generally would not be given if there was already an "established" recognized competition within the minimum distance on overlapping days. (R. 288-2/7-11/GR 212.1, GR 214.7) For most competitions, all that was needed to secure recognition despite the mileage restrictions was an agreement in writing by "all affected competition managements." (App. A.4; R. 288-2/9-10/GR 214.6) However, for competitions involving the hunter/jumper disciplines, deviation from the general mileage restriction required not only that written agreement, but the agreement had to be obtained each year, the distance between competitions could be no less than ten miles, and the proposed additional competition had to have different management from the established competition. (App. A.4)

The USEF's Board passed substantive rule changes in January 2005, which first went into effect for the 2006 competition year (from December 1, 2005, to November 30, 2006). (App. A.2, 23; R. 289-2/3/11) Among the changes was the enactment of a "license agreement" regime under which USEF has the explicit right to refuse renewal of a now-established competition's license if it fails to satisfy certain objective standards. (App. A.23) Concomitant revisions

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New Jersey, and Pennsylvania are governed by GR 214.1. The required distance between such competitions with A-rated (or equivalent) sections or classes is at least 125 miles. (App. A.4, 22) Contrary to Petitoners' innuendo (Petition p. 5 n.4), the American Horse Shows Association ultimately won the cited case, *Ashley Meadows Farm, Inc. v. American Horse Shows Ass'n*, 609 F. Supp. 677 (S.D.N.Y. 1985), which included an antitrust challenge to an earlier version of the Mileage Rule.

provide USEF with the explicit authority to grant or deny a license to a competition otherwise barred under the Mileage Rule regardless of whether the "established" competition agrees to the deviation from the mileage restriction. (App. A.23-24; R. 289-2/3/11; GR 212, 213, 214.5) By their plain language, the revised rules give "USEF ultimate control over the granting or denying of waivers under the Mileage Rule." (App. A.23; *see also* R. 363-6; App. A.36 n.17)

C. Promoter Profits and Athletic Competition

As USEF members, Petitioners have conducted NGB-recognized competitions at facilities in Florida; they have also conducted unrecognized equestrian competitions at the same facilities.[5] (App. A.5, 24-26; R. 317-14/2/3-4; 317-14/5-6/9 & 11; 317-18/2/8-9) The non-profit and for-profit promoters that were named as defendants in Petitioners' lawsuit, including the other Respondents, are also USEF members. (R. 293-2/4/13) Respondent promoters have conducted A-rated competitions in Florida and elsewhere in the United States, but have also held unrecognized competitions in Florida. (App. A.5, 26-27; R. 293-2/3/7-8; R. 286-2/2, 4/3-5,10) It was and is undisputed that USEF does not promote, operate, or manage horse shows. (App. A.21) It does not participate as a promoter, operator, or manager of hunter/jumper competitions in Florida in the winter months. (R. 289-2/5/17) There is no evidence that USEF profits from recognizing competitions or from its

[5] There is no NGB rule requiring that members exclusively participate in or promote recognized competitions. There are limitations only on including unrecognized classes within a recognized competition. (R. 302; GR 211)

rules' restrictions on A-rated competitions generally, or with respect to hunter/jumper competitions specifically.[6]

Before the District Court, it was undisputed that USEF acts in a "regulatory" capacity as the NGB, limiting and controlling both the athletes who compete in and the promoters who conduct recognized competitions. The USEF Bylaws place the power to promulgate rules in the hands of its 54-member governing Board of Directors. (App. A.2; R. 302, Bylaw 301 Section 1(2); *see also* App. A.29) Only ten of the Board members represent the hunter/jumper equestrian communities, and because at least two of those ten must be active athletes or have represented the United States in international amateur equestrian competition (App. A.29; R. 289-6/10, Bylaw 302 Section 1; R. 289-2/4/13), the influence of hunter/jumper promoters on the Board is circumscribed.[7]

Petitioners' stated objective was to conduct recognized A-rated hunter/jumper competitions at their Florida facilities during the four winter months (December-March). (App. A.5, 31) According to Petitioners:

> Holding an A-Rated Show rather than a show with a lower rating enables promoters to charge the highest entrant and attendee fees, obtain the largest corporate sponsorship fees, and to sell ancillary services (such as horse stall rentals, bedding, feed, grooming supplies, and the sale of food and beverages to exhibitors and spectators)

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[6] The USEF does not auction off competition licenses to the highest bidder; there is a small application fee. The annual fees and dues assessed a recognized competition are not based on the revenues or profits from the competition. (R.302; GR 215)

[7] Only one of the promoter defendants is (or has been) a USEF Board member: Thomas Struzzieri. He was elected to that Board position in January 2005. (App. A.26, 29; R. 289-2/4/13)

> at the highest rates. Promoters also profit from developing real estate adjacent to horse show venues as residences for riders who desire to remain in Florida throughout the Winter Season. Real estate near venues for A-Rated Shows is worth more than real estate near venues for lower rated shows.

(Petition p. 4) Thus, to Petitioners, equestrian competition is not about the athlete, but is a product to be sold to participants (entry fees), equine and equestrian goods and service providers (exhibitor and advertising fees), and spectators (admission fees) – and to be bundled as an amenity for real estate development schemes. (I.B. pp. 14-15; R. 317-14/7-8/14-16)[8] Petitioners presented evidence that they applied to the previous NGB for recognition of A-rated competitions on certain winter dates, but were informed that there were established competitions within the mileage restriction; when they asked established competition managers (including the promoter defendants) for written agreements to deviate from the Mileage Rule, those requests were denied. (Petition p. 6; I.B. p. 23)

To the NGB, "competition" is about the athletes – both horses and riders. Identifying who should represent the United States in international competitions, developing the next generation of elite athletes, and fostering grassroots participation and innovation in equestrian sport are core parts of the vision and mission of USEF as the NGB for equestrian sport. (R. 302, Bylaw 102, Section 1; *see, generally*, 36 U.S.C. §§ 220523, 220524) The operation of the competition rules, including the Mileage Rule, limits the number of highest-rated hunter/jumper competitions

[8] The citation "I.B." refers to the initial brief that Petitioners filed in the Court of Appeals.

in the same time period in any given area. This concentrates the elite athletes at those competitions, forcing "the best of the best to compete with each other." (R. 289-10/2/21-23; R. 289-8/2-3/6; *see also* App. A.48-49) With two or more A-rated competitions in close geographic proximity conducted at the same time, it is less likely that the best horses and athletes will compete against one another. (App. A.12, 48-49; R. 289-8/2-3/6)

Limiting recognition of like competitions in close proximity on overlapping days has fostered the development of equestrian sport across the United States, not just in former regional centers such as the Northeast. (R. 289-11/5/6-9; R. 289-11/2-3/13-4) The number of competitions has consistently increased, with 2,507 recognized competitions being held in 2004. (R. 289-2/4/16) Additionally, the Mileage Rule promotes the health and welfare of horses by limiting incentives for horse owners to overuse their horses by chasing "points" and prize money at multiple competitions on the same or proximate days in the same geographic area. (App. A.12-13, 49; R. 289-8/3/7)

The Mileage Rule also leads to the dispersion of these elite competitions throughout the United States and throughout the year. A promoter who cannot hold an A-rated competition at an already-served location and time may then expand the opportunities for the athletes by locating such an elite level competition in an underserved region or at an otherwise empty spot on the calendar.[9] If determined to hold a horse show at that location and time, a promoter may do so by offering a different competition, for example, one with B- or C- level hunter/jumper

[9] For example, Petitioner JES Properties, Inc. conducted A-rated competitions in Florida during the summer months. (App. A.24; R. 317-14/5-6/11)

divisions or an unrecognized competition at which there can be innovations in the sport not yet allowed within the NGB rules.[10]

D. The Proceedings and Disposition in the District Court

Petitioners began their action in the District Court in August 2002, asserting federal antitrust claims against several promoters of hunter/jumper competitions in Florida and against USAE, the former NGB for equestrian sport in the United States. (R. 1; *see also* App. A.18) In amended complaints filed in April 2003 (R. 42) and January 2004 (R. 82), Petitioners expanded their claims to include state antitrust and unfair trade practice claims and to name additional defendants. Among the defendants added in January 2004 was USEF. (App. A.18-19)

In the second half of 2004, Petitioners settled with various defendants, including USAE, and the claims against those defendants were dismissed. (App. A.18 n.1) Then, in December 2004, Petitioners sought and obtained leave to file yet another amended complaint (R. 258), adding one more defendant and alleging violations of the Sherman Act §§ 1 and 2 and the parallel Florida laws, FLA STAT. ch. 542.18 and 542.19. (App. A.19-20) After the close of discovery, in February 2005, USEF and other remaining defendants moved for summary judgment on all counts of Petitioners' latest amended complaint. (R. 287, 290, 292, 294; *see also* App. A.20)

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[10] Petitioners have conducted such lower-rated and unrecognized competitions, as have the promoter defendants. (App. A.24-28; R. 317-14/5-6/11)

On May 9, 2005, the District Court issued an order ruling that undisputed facts established that the defendants were entitled to judgment as a matter of law. (App. A.17-57; R. 363) The District Court first considered the contention that the ASA provided implied antitrust immunity in connection with the establishment and enforcement of the Mileage Rule. (App. A.32) The court recognized that "[a]s the NGB for equestrian sport in the United States, USEF performs many functions including the promulgation of scheduling and competition rules such as are at issue in the present case." (App. A.34) The court further noted that the Act "requires USEF, as the NGB for equestrian sport, to coordinate amateur equestrian activity in the United States and to minimize scheduling conflicts." (App. A.34-35) Observing that "[s]cheduling is central to the governing of any sport," the court concluded that the Mileage Rule, given its conceded effectiveness in minimizing scheduling conflicts, "is exactly the type of action which the Amateur Sports Act directs." (App. A.35) The court therefore held that "the Mileage Rule should be exempted and Plaintiffs' antitrust claims against USEF should be barred since USEF's Mileage Rule minimizes scheduling conflicts and implements Congress' intent with regard to the governance of amateur athletics." (App. A.36)

As an alternative ground for summary judgment, the District Court held that Petitioners lacked standing because they failed to demonstrate that they suffered antitrust injury. (App. A.37-39) A further alternative basis for granting summary judgment on the claim under Sherman Act § 1 was that Petitioners had failed to present evidence sufficient to demonstrate elements necessary to prove a violation. Specifically, Petitioners (1) presented no credible evidence of a conspiracy or other concerted action in restraint of trade (App. A.40-43), and (2) failed to show

that the Mileage Rule operated as an *unreasonable* restraint of trade (App. A.43-49).

The District Court disposed of Petitioners' claims against USEF under Sherman Act § 2 (for alleged monopolization, attempt to monopolize, and conspiracy to monopolize) by finding that Petitioners had failed to present any evidence that USEF competed in the relevant market. (App. A.50-51) As to the monopolization claims against the promoter defendants, the court held that Petitioners had not submitted sufficient evidence that those defendants shared, attempted to share, or conspired to share monopoly power in the relevant market. (App. A.51-54) Noting that the state-law claims were subject to the same rules that required summary judgment on the federal antitrust claims, the court also entered summary judgment against Petitioners on those claims. (App. A.54-56)

Judgment was entered the next day, closing Petitioners' case. (R. 364) Petitioners appealed generally from that judgment to the United States Court of Appeals for the Eleventh Circuit, but they limited their appeal to the Sherman Act § 1 claims and related state-law claims. (*see* App. A.6) Issues particular to their federal and state monopolization claims were abandoned before the Court of Appeals.

E. The Decision of the Court of Appeals

In a decision rendered August 2, 2006, the Court of Appeals affirmed the District Court's summary judgment in its entirety. (App. A.1-16) The court concluded that the defendants are immune from antitrust liability under the circumstances of this case. (App. A.6, 12-15) Specifically, the court held that the Act impliedly repealed the antitrust laws to the extent that USEF was acting pursuant to

the auth[illegible]y conveyed to it by that act in promulgating and enfo[illegible]g the Mileage Rule. (App. A.7, 12-15)[11]

Recognizing that repeal of the antitrust laws by implication is not to be lightly inferred and requires a plain repugnancy between the antitrust statutes and the other statutory provisions (App. A.8), the court addressed the argument "that the ASA confers on the USEF the authority to promulgate the Mileage Rule [coordinating schedules] and that application of the antitrust laws to the enforcement of the Mileage Rule is plainly repugnant to that authority." (App. A.10) After examining decisions from other circuits, the Court of Appeals concluded that "the 'monolithic control' a NGB has over its particular [sport] may excuse actions that would otherwise violate antitrust laws." (App. A.12) Thus, the court examined whether "the application of the antitrust laws to the facts of this case would unduly interfere with the operation of the ASA." (App. A.12 (internal quotation marks omitted)) The court identified how the Mileage Rule was part of the intended operation of the Act, and specifically the requirements in 36 U.S.C. § 220524 "to minimize conflicts in the scheduling of competitions and to 'develop interest and participation throughout the United States' in their particular sport." (App. A.12-A.13) The Mileage Rule thus was "an exercise of the 'monolithic control' Congress conferred on the USEF." (App. A.13)

The Court of Appeals rejected Petitioners' contention that "if the USEF and equestrian sports can function without the Mileage Rule, the USEF and the Promoter Defendants are not entitled to immunity." (App. A.13) The court concluded that Petitioners' understanding of what

[11] The court declined to reach the question of whether Petitioners had standing or suffered antitrust injury. (App. A.6-8)

makes a rule "necessary" was "too restrictive." (App. A.14) Instead, the pertinent inquiry, according to the court, was whether a recognition of USEF's general authority to promulgate and enforce rules such as the Mileage Rule was "necessary" to enable it to function as Congress envisioned an NGB would function under the Act – not whether that particular rule was "wise or indispensable." (App. A.15)

> This Court will not substitute its own judgment for that of the USEF regarding the optimum way to fulfill its obligations. If this Court were to apply the test that [Petitioners] JES and Mr. Gallagher suggest – determining whether the Mileage Rule is necessary – it would threaten the national uniformity Congress envisioned in enacting the ASA. This inability to engage in the analysis [Petitioners] suggest without disrupting the ASA illustrates why implied immunity is called for in this case. The question before this Court is whether the application of antitrust laws to the actions of the USEF and the Promoter Defendants is "plainly repugnan[t]" to the ASA. *Gordon*, 422 U.S. at 682. . . . . Because the ASA requires an NGB to promulgate rules to minimize conflicts in schedules, the imposition of antitrust liability for the promulgation of such a rule is "plainly repugnan[t]" to the ASA.

(App. A.15 (some citations omitted)) The Court of Appeals therefore affirmed the summary judgment in the defendants' favor. (App. A.16)

REASONS FOR DENYING THE WRIT

I. The same standard was applied by the Eleventh Circuit to the Amateur Sports Act as was applied by this Court in *Silver*, *Gordon*, and *NASD* to the statutorily-established scheme for regulating securities transactions.

1. The Eleventh Circuit's decision was not as caricatured in Petitioners' second Question Presented. The appellate court concluded that one rule promulgated by the NGB for equestrian sport, the Mileage Rule, was within the repeal of the antitrust laws implied by ASA provisions mandating that NGBs minimize scheduling conflicts and "develop interest and participation throughout the United States." Furthermore, it reached that conclusion in the context of a District Court determination on summary judgment that the antitrust defendants' challenged actions were not an unreasonable restraint of trade. Thus, Petitioners' presented question of whether this Court's decisions preclude a holding "that any and all rules promulgated by an NGB under the ASA are impliedly exempt from antitrust scrutiny as a matter of law, no matter their admitted anti-competitive effects" is purely hypothetical.

Petitioners repeatedly mischaracterize the Eleventh Circuit's decision as granting "blanket antitrust immunity" to "any and all rules adopted by an NGB." Petition pp. 7, 8, 9, 11, 12. In reality, the Eleventh Circuit's opinion speaks to *one* rule (the Mileage Rule) adopted by *one* NGB (USAE, the predecessor NGB to Respondent USEF). Furthermore, although the 250-mile limit of GR 214.2 is generally applicable to all 27 breeds and disciplines within USEF, the Petitioners' particular challenge was to a now-superceded portion of the Mileage Rule that applied only to A-rated (or equivalent) hunter/jumper competitions. The

rulings of both the District Court and Eleventh Circuit do not give "blanket antitrust immunity" to any NGB rule. The summary judgment was specific to Petitioners' antitrust claims against the old version of the Mileage Rule as it applied to the relevant market claimed by Petitioners: A-rated hunter/jumper competitions held in Florida during the four winter months. *See* App. A.24.[12]

In addition, there was no concession or admission in this case that the USAE Mileage Rule had anticompetitive effects, despite Petitioners' persistent assertion that there was. Petition pp. 5, 6 n.7, 8. The portion of the District Court opinion cited actually states that "since the Defendants do not specifically address whether the alleged violative conduct has restrained competition in the Relevant Market, for purposes of its rule of reason analysis, this Court will presume without finding that Plaintiffs have demonstrated an anticompetitive effect in the Relevant Market." App. A.46.[13] As in the District Court and the Eleventh Circuit, Petitioners here fail to articulate what anticompetitive effect is claimed to have resulted from the Mileage Rule. Other than the restraint that is effected by any regulation and contract, *see Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918), Petitioners presented no facts establishing that there was any arguably anticompetitive effect. They appear to be most exercised about the now-superseded portion of the Mileage Rule, USAE 214.7, which allowed for a new competition within the 250-mile limit to be recognized if the existing

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[12] Although there was a dispute about the definition of the relevant market, the District Court addressed the summary judgment motions as if the relevant market was as Petitioners defined it. App. A.24 n.10.

[13] The Court then went on to determine that pro-competitive effects of the Mileage Rule outweighed any anticompetitive effects. App. A.47-49.

competition management waived the limit.[14] That allowance, however, was clearly *pro-competitive* relative to an absolute 250-mile exclusion.

The question presented thus is no more than a hypothetical with no connection to any articulated dispute in this litigation. Such an abstract proposition is not a proper basis for grant of a writ of certiorari. *See Ticor Title Ins. Co.* v. *Brown*, 511 U.S. 117, 118 (1994) (per curiam) (dismissing writ as improvidently granted on conclusion that case "would require us to resolve a constitutional question that may be entirely hypothetical"); *The Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) (dismissing writ as improvidently granted because the issue posed was no longer "in the context of meaningful litigation"). This Court has long refused to issue advisory opinions, *see Hayburn's Case*, 2 Dall. 409, 1 L.Ed. 436 (1792), and Petitioners can present no compelling reason to review a hypothetical "decision" that was never issued by the Eleventh Circuit.

2. The Eleventh Circuit's finding of implied repeal is consistent with this Court's decisions addressing the interaction between the antitrust laws and the regulatory scheme established by the securities laws. The Eleventh Circuit properly examined whether "antitrust immunity, as a matter of law, must be implied in order to permit the [Act] to function as envisioned by Congress," *Gordon* v. *New York Stock Exch.*, 422 U.S. 659, 688 (1975), and

[14] Petitioners misleadingly characterize the old version of the rule, USAE GR 214.7, as providing that "if an incumbent promoter decides, in its sole discretion, to grant a Mileage Rule waiver, the 250-mile radius of exclusion is reduced to 10 miles." Petition p. 11 n.8. It would be more accurate to state that no waiver could be effective if the other show was within 10 miles of the existing show.

declined to examine whether the particular rule challenged was a wise one or necessary to the operation of the NGB.

It is ironic that Petitioners attempt to portray the Eleventh Circuit as granting immunity "regardless of anticompetitive effects," because such a decision would not be inconsistent with the three cited cases from this Court. *Silver* v. *New York Stock Exch.*, 373 U.S. 341 (1975), *United States* v. *NASD*, 422 U.S. 694 (1975), and *Gordon* each considered immunity *despite* the fact that the challenged conduct was otherwise a *per se* violation of the antitrust laws. *Silver*'s starting point was a recognition that the challenged "collective action of the Exchange and its members would, had it occurred in a context free from other federal regulation, constitute a *per se* violation of § 1 of the Sherman Act. . . ." 373 U.S. at 347. "Hence, absent any justification derived from the policy of another statute or otherwise, the Exchange acted in violation of the Sherman Act." *Id.* The *Gordon* Court noted that the challenged conduct of the Exchange and its members constituted price fixing and that legislative permission for "the fixing of commission rates under the supervision of the SEC occurred seven years after this Court's decision . . . to the effect that price fixing was a *per se* violation of the Sherman Act." 422 U.S. at 682. It was likewise recognized in *NASD* that the restrictive agreements at issue there "normally would constitute *per se* violations of § 1 of the Sherman Act." 422 U.S. at 729.

Silver, *Gordon*, and *NASD* each examined whether implied repeal of the antitrust laws was necessary to make the securities statutes work as Congress intended. The task presented was to "reconcile pursuit of the antitrust aim of eliminating restraints on competition with the effective operation of a public policy contemplating that securities exchanges will engage in self regulation which may well have anticompetitive effects in general and in

specific applications." *Silver*, 373 U.S. at 349. The three decisions addressing antitrust immunity cannot be divorced from their context, which required consideration of the particular conduct that was challenged and the relevant portions of the Securities Exchange Act, Investment Company Act, or Maloney Act. The "general policy of self-regulation by the exchanges coupled with oversight by the SEC," *Gordon*, 422 U.S. at 667 (referring to the Exchange Act), required that the antitrust laws give way with respect to the fixed commission rates challenged in *Gordon*, 422 U.S. at 691, and the restrictive agreements challenged in *NASD*, 422 U.S. at 730, 735.[15] Implied repeal was not necessary in *Silver*: although the exchange rules were within "the statutorily imposed duty . . . to formulate rules governing the conduct of exchange members," 373 U.S. at 353, the Exchange's particular enforcement of those rules that was challenged by Silver was not expressly directed or authorized by the Exchange Act and the SEC had not been given authority to oversee such enforcement actions. *Id.* at 357.[16]

The complexities of analyzing challenges to specific actions that were authorized but not mandated by the applicable statute and of considering the regulatory authority and actual activity of the SEC consume *Gordon* and most of *Silver* and *NASD*. For one challenge, however, the exemption decision was much simpler. In *NASD*, because § 22(d) of the Investment Company Act expressly

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[15] By limiting the implied repeal to the circumstances presented, *Gordon* and *NASD* kept the antitrust laws from being completely ousted.

[16] Reconciliation with the antitrust laws did require, however, that the otherwise *per se* antitrust violation would be examined under the rule of reason for justification as being within the scope and purposes of the Exchange Act. 373 U.S. at 360.

required maintenance of a uniform price with respect to mutual fund sales, "no question exists that antitrust immunity must be afforded these sales." *NASD*, 422 U.S. at 699. On this point, the *NASD* dissenters were in agreement: "If Congress itself expressly permits or directs particular private conduct that would otherwise violate the antitrust laws, it can be safely assumed that Congress has made the necessary policy choices and preferred to permit rather than to prevent the acts in question." *Id.* at 736 (White, J., dissenting).

Since this Court has never considered a question of whether the ASA impliedly repeals another statute,[17] the Eleventh Circuit relied on *Silver*'s general warning that "repeals by implication are not favored," 373 U.S. at 358 (internal quotation marks omitted), and the more specific principle that repeal of the antitrust laws should be implied "only if necessary to make the [other statute] work, and even then only to the minimum extent necessary." *Id.* The Eleventh Circuit looked to decisions which followed the *Silver* principles in examining the interaction between the ASA and the antirust laws to determine whether the challenged conduct was exempted. The end result was the same as in *Gordon* and *NASD*, and was consistent with *Silver,* because the ASA expressly directs an NGB to "minimize . . . conflicts in the scheduling of all practices and competitions. . . ." 36 U.S.C. § 220524(2).

The Eleventh Circuit specifically considered and rejected Petitioners' contention that, before the antitrust laws give way, the Mileage Rule and all its particulars

[17] In *San Francisco Arts & Athletics* v. *United States Olympic Committee*, 483 U.S. 522 (1987), this Court upheld the grant to the USOC of an exclusive right to the use of the word "Olympic" in 36 U.S.C. § 220506(a)(4).

must be shown to be necessary to Congress' intended operation of the ASA. In reaching its decision, the court relied upon *Gordon*'s holding that implied immunity was not a "factual question as to whether fixed commission rates are actually necessary to the operation of the exchanges as contemplated under the Securities Exchange Act." App. A.14 (quoting *Gordon*, 422 U.S. at 688). An NGB must promulgate certain rules to carry out its express duties and intended role under the ASA. App. A.9-10. Thus, interposition of the antitrust laws, which might bar a scheduling rule that potentially limits the number of competitions, would be plainly repugnant to the system established by Congress that there be one and only one NGB per Olympic sport, with the duty and authority to minimize scheduling conflicts and otherwise regulate the sport. *Silver*, *Gordon,* and *NASD* did not consider whether Congress was correct to have authorized that there be a rule, whether the rule promulgated was "necessary," or if a different rule would have fewer competitive effects. Petitioners provide no reason that such a requirement should now be read into this Court's decisions.

II. The Eleventh Circuit's application of this Court's principles regarding implied repeal is consistent with *Billing* and in accord with other Circuits' decisions about implied repeal by the Amateur Sports Act.

1. Petitioners argue that the Second Circuit's opinion in *Billing* v. *Credit Suisse First Boston Ltd.*, 426 F.3d 130 (2nd Cir. 2005) and the Eleventh Circuit's opinion here result in a "circuit split" regarding implied repeal of the antitrust laws. To the contrary, no conflict exists because each decision proceeds from the same fundamental principles, addresses specific statutes, and shapes the analysis

to conform to the circumstances presented. Petitioners' attempt to manufacture a conflict thus fails.

Though faced with substantially different circumstances, the Second Circuit and the Eleventh Circuit applied the same basic principles established by this Court in *Silver* and *Gordon*. Each opinion discussed how implied immunity can be found only in the face of a "plain repugnancy between the antitrust and regulatory provisions," App. A.8, and that "repeal is to be regarded as implied only if the repeal is necessary to make the regulatory provisions work," App. A.8. *See also Billing*, 426 F.3d at 146-47. Both decisions agree that "the crux of the implied immunity claim [is a] demonstration that Congress clearly intended a repeal of the antitrust laws." *Id.* at 168. In exploring Congress' intent, the Eleventh Circuit in this case and the Second Circuit in *Billing* properly focused on different considerations because different statutes are involved. *See Phonetele, Inc.* v. *AT&T*, 664 F.2d 716, 727-28 (9th Cir. 1981) (noting that "there is no simplistic and mechanically universal doctrine of implied antitrust immunity; each of the Supreme Court's cases is decisively shaped by considerations of the special aspects of the regulated industry involved").

Billing presented issues involving complex securities regulation, while this case deals with regulation of amateur sports under the ASA; the Second Circuit drew upon the host of decisions examining antitrust immunity in the securities industry, while the Eleventh Circuit properly looked to decisions from the Tenth and Fifth Circuits that discussed the interplay between antitrust laws and the ASA. In its opinion, the Eleventh Circuit also specifically addressed the Second Circuit's decision in *Billing*, noting that "[r]egardless of whether *Billing* would require a more searching scrutiny of the Mileage Rule, this Court follows the more closely analogous holdings in *Behagen* and *Eleven Line*." App. A.16. No conflict arises from the mere fact that

the Eleventh Circuit looked to different considerations than did the Second Circuit. *See Phonetele*, 664 F.2d at 727-28.

Petitioners attempt to manufacture a conflict between *Billing* and this case by arguing that *Billing* stands for the proposition that a court must scrutinize the specific rule promulgated "to determine its reasonability and whether antitrust immunity for the conduct at issue is essential to enable Congress' intent in enacting the regulatory statute." Petition p. 10. This is incorrect. The Second Circuit noted that when a specific conflict exists between a regulatory rule and antitrust laws, "we will apply immunity if we determine that Congress contemplated the specific conflict and intended for the antitrust laws to be repealed." *Billing*, 426 F.3d at 164. The Second Circuit did not hold that the specific rule must be subjected to a "reasonability" analysis or that the particular regulation must be essential to enable Congress' intent. Instead, it focused on the regulatory statute at issue and its potential conflict with the antitrust laws – as did the court here in finding that application of the antitrust laws to the challenged conduct was plainly repugnant to the Act. App. A.9-13.[18]

Moreover, Petitioners assert that *Billing* requires the application of a multi-factor test to determine whether the Act impliedly repeals the antitrust laws, and that the Eleventh Circuit erred in this case by failing to apply each of the factors. Petition p. 7. The Second Circuit listed various factors – including legislative history and construction of the statute at issue, the possibility for conflicting mandates, the history of agency regulation of the

[18] The Eleventh Circuit properly dismissed the need for a "reasonability" analysis of the Mileage Rule because the particulars of the rule were not the focus of the inquiry; the question was whether promulgating scheduling rules is necessary for USEF to carry out its duties under the Act. *Id.*

anticompetitive conduct, and any other evidence indicating implied repeal – and explained that they inform the inquiry into Congress' intent when considering a statute that creates or contemplates oversight by a regulatory agency. *Billing*, 426 F.3d at 164-65.[19] *Billing* cannot be read to mandate an across-the-board application of the factors to different types of statutes or in all situations.

Furthermore, in this case, the Eleventh Circuit thoroughly reviewed the Act, its history, and prior cases interpreting its language to determine Congress' intent in passing the statute. After that review, the Court ultimately agreed with the Fifth Circuit that "'the directives of the [ASA made] the intent of Congress sufficiently clear.'" App. A.11 (internal quotation marks omitted). As such, the immunity analyses used by the Second Circuit in *Billing* and the Eleventh Circuit in this case in no way create the "sharp conflict" between the Circuits alleged by Petitioners. Both courts applied the basic implied repeal principles established by this Court and shaped their analyses to properly address the specific facts and claims presented for review.

2. The only previous Circuit decisions about implied repeal of the antitrust laws by the Act are *Behagen* v. *Amateur Basketball Ass'n*, 884 F.2d 524 (10th Cir. 1989), and *Eleven Line, Inc.* v. *North Texas State Soccer Ass'n, Inc.*, 213 F.3d 198 (5th Cir. 2000). The Eleventh Circuit correctly identified these as the closest persuasive authority, and its

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[19] In other recent cases that did not involve the securities industry, the Second Circuit determined antitrust exemption questions without applying the particular analysis and factors articulated in *Billing*. *See, e.g.*, *Clarett* v. *National Football League*, 369 F.3d 124, 135 (2nd Cir. 2004) (holding that NFL player eligibility rule fell within scope of nonstatutory exemption to antitrust review implied from federal labor laws).

holding is not in conflict with either decision. The holding is also consistent with decisions addressing conflict between the Act and other federal statutes, and with decisions about implied repeal of the antitrust laws by federal statutes assigning specific responsibilities and duties to private entities.

The Tenth Circuit held in *Behagen* that the Act impliedly repealed the antitrust laws with respect to a claim that the NGB's refusal to reinstate Behagen's amateur eligibility constituted a group boycott in violation of Sherman Act § 1. The challenged "actions in this case were clearly within the scope of activity directed by Congress and were necessary to implement Congress' intent with regard to the governance of amateur athletics." 884 F.2d at 527. The court found that "the monolithic control exerted by an NGB over its amateur sport is a direct result of the congressional intent expressed in the Amateur Sports Act." *Id.* at 528 & n.4. The Act clearly included within that "monolithic control" the subject of "amateur eligibility for Americans that participate in the sport." *Id.* at 529 (citing 36 U.S.C. §§ 391(b)(12), 393(7), now codified as 36 U.S.C. §§ 220522(a)(14), 220523(a)(7)). The Tenth Circuit did not scrutinize the "necessity" of the particular reinstatement rule applied by the NGB or whether a more-liberal reinstatement policy that would allow Behagen to participate in amateur athletic competitions would have been possible under the Act.[20] Furthermore, although the NGB was authorized (but not mandated) to "establish procedures for determining eligibility standards for participation in competition," 36 U.S.C. § 220523(a)(5), the

[20] Although the Act requires that an NGB not have "eligibility criteria related to amateur status . . . that are more restrictive than those of the appropriate international sports federation," 36 U.S.C. § 220522(a)(14), it does not proscribe *less restrictive* criteria.

Tenth Circuit found that the American Basketball Association "could not be authorized under the Act unless it maintained exactly that degree of control over its sport that Behagen here alleges as an antitrust violation." 884 F.2d at 529 (citing 36 U.S.C. § 391(b)(4), now codified as 36 U.S.C. § 22052(a)(5)).

Other courts have built from the foundation provided by *Behagen*. For example, it has been held that "Congressional intent to require athletes to exhaust their administrative remedies in regard to eligibility disputes appears evident given the scope of the Act, the specific statutory mechanisms that have been established for speedy settlement of these disputes, and congressional intent to establish a centralized, monolithic structure for coordinating amateur athletics." *Barnes* v. *International Amateur Athl. Fed'n*, 862 F. Supp. 1537, 1544 (S.D. W.Va. 1993). In *Eleven Line*, the Fifth Circuit stated that "the *Behagen* case was correctly decided," but rejected an implied-repeal argument by the North Texas State Soccer Association, a regional amateur sports organization for soccer. Eleven Line claimed that the association's membership rule requiring that players, coaches, and referees play soccer only at "sanctioned" facilities effected a group boycott of its non-sanctioned arena in violation of Sherman Act § 1. The Fifth Circuit distinguished *Behagen* on the basis that the rule in question had neither been promulgated nor expressly approved by the NGB. If it had been, "it would be a player eligibility rule exempted under *Behagen*. . . ." 213 F.3d at 205.

Unlike the rule challenged in *Eleven Line*, the Mileage Rule that Petitioners challenge was promulgated by the NGB for equestrian sport. Like the rule challenged in *Behagen*, the Mileage Rule is on a subject placed within the monolithic control of the NGB – the scheduling of competitions. The Act not only authorizes USEF (and

before that, USAE) to "serve as the coordinating body for amateur athletic activity in the United States," 36 U.S.C. § 220523(a)(3) – it mandates that it "minimize . . . conflicts in the scheduling of all practices and competitions," 36 U.S.C. § 220524(2). Under those circumstances, the only decision by the Eleventh Circuit that could be in accord with the opinions of other Circuits expressed in *Behagen* and *Eleven Line* was to hold that the Act impliedly repealed the antitrust laws with respect to Petitioners' challenge to the Mileage Rule.

In addition, the Act has been held to impliedly repeal or preempt laws other than the antitrust statutes. *See, e.g., Lee* v. *United States Taekwondo Union*, 331 F. Supp. 2d 1252, 1260-61 (D. Hawaii 2004) (finding that the later and more specific ASA governed at points of conflict with the Civil Rights Act, 42 U.S.C. § 1981, and that deference to NGB decisions also precludes discrimination claims or remedies therefor that would conflict with sport governance); *Slaney* v. *International Amateur Athl. Fed'n*, 244 F.3d 580, 596 (7th Cir. 2001) (holding that state-law claims challenging USOC's method of determining plaintiff's eligibility were preempted by the Act), *cert. denied*, 534 U.S. 828 (2001).[21] Courts have also implied from the Act that Congress intended minimal interference with the NGBs and the USOC in areas designated as their responsibility, and have held that there was no implied private right of action or that administrative remedies internal to the NGB or USOC be exhausted before seeking judicial review. *See, e.g., Oldfield* v. *The Athletic Cong.*, 779 F.2d

[21] *See also Walton-Floyd* v. *United States Olympic Comm.*, 965 S.W.2d 35, 40 (Tex. App. 1998) ("To hold a common law duty exists outside the scope of the Act, thereby enabling an individual athlete to bring suit, threatens to override legislative intent and opens the door to inconsistent interpretations of the Act.").

505 (9th Cir. 1985) (amateur status); *Michels* v. *United States Olympic Comm.*, 741 F.2d 155 (7th Cir. 1984) (drug suspension); *DeFrantz* v. *United States Olympic Comm.*, 492 F. Supp. 1181, 1191-92 (D.D.C.) (USOC decision not to enter a team in the Moscow Olympics), *aff'd mem.*, 227 U.S. App. D.C. 210, 701 F.2d 221 (1980).[22] Furthermore, the Eleventh Circuit's holding is in line with other Circuits' decisions that implementation of Congressional mandates by specifically designated entities is exempt from antitrust liability. *See, e.g., McCarthy* v. *Middle Tenn. Elec. Membership Corp.*, 466 F.3d 399, 414 (6th Cir. 2006) (holding that TVA was entitled to antitrust immunity because 16 U.S.C. § 831i authorized it to enter into contracts promoting use of electric power and "concerns about competition would conflict with the fulfillment of TVA's purpose"); *Alpha Lyracom Space Comm'ns, Inc.* v. *Communications Satellite Corp.*, 946 F.2d 168, 174 (2nd Cir. 1991) ("Having created COMSAT to wield monopoly power, along with the other participants in a global satellite system, Congress did not expect that corporation to face antitrust liability in deciding, as a member of INTELSAT, whether and to what extent to permit competition."), *cert. denied*, 502 U.S. 1096 (1992).

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[22] *See also Barnes*, 862 F. Supp. at 1545-46 (dismissing, for failure to exhaust administrative remedies, complaint about doping violation disqualification from Olympic trials); *Devereaux* v. *Amateur Softball Ass'n of Amer.*, 768 F. Supp. 618, 624 (S.D. Ohio 1991) (holding that court involvement in challenge to NGB's rules and eligibility decision was premature given Act's provision for administrative remedies and arbitration procedures); *Walton-Floyd*, 965 S.W.2d at 39-40 (no implied private right of action for money damages); *Dolan* v. *United States Equestrian Team, Inc.*, 257 N.J. Super. A.D. 314, 608 A.2d 434, 437 (1992) (affirming dismissal of challenge to exclusion from national team, citing "Congressional determination that these types of disputes should be resolved outside the judicial processes").

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 06-576

In the Supreme Court of the United States

JES PROPERTIES, INC.
d/b/a CYPRESS TRAILS FARM,
a Florida corporation, and
MICHAEL W. GALLAGHER,

Plaintiffs,

vs.

USA EQUESTRIAN TRUST, INC., f/k/a USA EQUESTRIAN, INC. (formerly the American Horse Show Association), UNITED STATES EQUESTRIAN FEDERATION, INC., DAVE BURTON a/k/a DAVE BURTON, SR. a/k/a DAVE E. BURTON a/k/a DAVID E. BURTON, SR., BURTONS AND SONS, INC., DAVID BURTON a/k/a DAVID BURTON ,JR., a/k/a DAVID E. BURTON a/k/a DAVID E. BURTON, JR., LITTLEWOOD FENCES, INC., LTD., KERNAN HODGES a/k/a MRS. EUGENE R. MISCHE, STADIUM JUMPING, INC., THOMAS E. STRUZZIERI, HORSE SHOWS IN THE SUN, INC., LINDA S. ALDRICH, AND FOX LEA FARM, INC.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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This Reply Brief is submitted pursuant to Supreme Court Rule 15(6) in reply to the Opposition Briefs of Respondents United States Equestrian Federation Inc ("USEF") and Thomas G. Struzzieri and Horse Shows In The Sun, Inc. ("Respondents")[1], and in support of Petitioners' Petition for Writ of Certiorari. With all due respect, Respondents' Opposition Briefs contain significant misstatements and omissions, which necessitate this Reply.

First, Petitioners believe it important to note that this Court granted the Petition For Writ of Certiorari in *Credit Suisse First Boston Ltd. v. Billing*, No. 05-1157 ("*Billing*"), on December 7, 2006. Respondents omit this significant fact, which is especially important because the Eleventh Circuit expressly refused to follow *Billing* when it granted antitrust immunity to the USEF Mileage Rule at issue here. 458 F.3d at 1233.

Of equal importance, while they accuse Petitioners of misstating the Eleventh Circuit's opinion, Respondents in fact themselves incorrectly describe it. Petitioners submit that the Eleventh Circuit's opinion cannot possibly be read to stand for any proposition other than granting a blanket antitrust exemption for the Mileage Rule, without analysis of the Rule or whether it is necessary to make the Amateur Sports Act ("ASA") work.

In marked contrast to the Second Circuit's approach to implied antitrust immunity in *Billing*, which follows the prior decisions of this Court, the Eleventh Circuit cited only *Behagen v. Amateur Basketball Ass'n of the United States*, 884 F.2d 524 (10th Cir. 1989), *cert. denied*, 495 U.S. 918 (1990), and *Eleven Line, Inc. v. North Texas State Soccer Ass'n, Inc.*, 213 F.3d 198 (5th Cir. 2000), as authority for the proposition that any rule adopted by a National Governing

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[1] None of the other Respondents has filed an Opposition Brief.

Body ("NGB") under the ASA which purports to deal with a general subject matter the NGB is authorized to regulate has blanket antitrust immunity, without having to analyze the rule to determine whether it is reasonable and necessary to effectuate congressional intent as embodied in the ASA. 458 F.3d at 1231-33.

Neither *Behagen* nor *Eleven Line* so holds. To the contrary, both cases specifically and carefully analyzed the rules involved. The Eleventh Circuit's misdirected reliance on the term "monolithic control" used in *Behagen* does not support its conclusion that all actions of an NGB are exempt from the antitrust laws. Rather, that language was used by the *Behagen* court to explain that, under the rule at issue there (defining who was eligible to be an amateur basketball player) the NGB and only the NGB had the power to determine player eligibility. That unshared power was what made its control "monolithic." *Behagen* does not suggest, as the Eleventh Circuit evidently believed, that every rule promulgated by an NGB under the ASA is automatically exempt from antitrust scrutiny, particularly where, as here, the NGB has shared or even outright delegated the scheduling power to for-profit private parties like the Promoter Respondents.

Respondents also appear to suggest that this Court's opinion in *Gordon v. New York Stock Exchange Inc.*, 422 U.S. 659, 95 S.Ct. 2598 (1975), supports the proposition that there may be blanket antitrust immunity for the ASA's regulatory scheme, without reference to or analysis of the specific rule at issue. But *Gordon* says no such thing. Restating the well settled proposition that repeal of the antitrust laws by implication is not favored and must not be casually allowed, *Gordon* held that the NYSE system of fixed commission rates operating under the active supervision of the SEC was entitled to antitrust exemption because imposition of antitrust liability against such positive SEC actions would unduly interfere with the operation of the

Securities and Exchange Act. *Gordon* carefully noted and explained the specific statutory provision that granted exclusive authority over commission rates to the SEC, as well as the extensive legislative history and congressional conduct confirming Congress' intent to cede control of commission rates to the SEC alone. 422 U.S. at 662, 682-86.

Here, to the contrary, as USEF concedes (USEF Br., p. 21), no court, let alone this Court, has ever held or even suggested that the ASA impliedly repealed another statute. It does not. Accordingly, as the Second Circuit held in *Billing* and as the courts also held in *Behagen* and *Eleven Line*, it is necessary to examine and analyze the Mileage Rule to determine its reasonability and whether it is necessary to make the ASA work.

Furthermore, while the question is not directly before this Court at this juncture, strong arguments exist for holding that the Mileage Rule is not reasonable and not necessary to make the ASA work. If "monolithic control" by an NGB is the correct standard, the Mileage Rule is the antithesis of "monolithic control." Both the district court and the Eleventh Circuit "blessed" the Mileage Rule, without examination, simply because it dealt with "scheduling," one of the areas in which the NGBs like USEF have at least subject matter jurisdiction. But until the Rule was amended effective in 2006, encompassing a lengthy time period during which Petitioners claim substantial damages, the Mileage Rule placed all scheduling decisions for A-Rated Shows in the crucial Florida Winter Season, which the district court accepted as the Relevant Market, (Rule 214.7; R. 317-14/8-9/18; R. 317-18/5/21; A. 24) not in the hands of the NGB, but rather solely in those of a small cartel of private for-profit promoters. The USEF had virtually nothing to say in this regard. This small group of incumbent promoters could and did grant each other waivers while excluding non-members of the cartel like the

Petitioners from the Relevant Market, at their choice alone.[2]

While Respondents point to the 2006 Amendments to the Mileage Rule, only an incumbent promoter has the power to initially approve a waiver request even under those Amendments. Thus, under the Amended Mileage Rule provides that if the incumbent promoter declines to grant a waiver to allow a competing promoter to hold an A-Rated Show, USEF cannot override that decision since one of the prerequisites for USEF to grant a sanction for the competing show will not be met.[3] At the very least, there is a substantial question whether the Amended Mileage Rule, enacted long after this litigation was commenced, continues to grant the private Promoter Respondents, rather than USEF, ultimate control over scheduling.

Similarly, and while also not directly relevant at this juncture, USEF's Brief contains a dissertation extolling the alleged benefits of the Mileage Rule, including supposed protection of horses and riders and the assurance that the "best would compete against the best." (USEF Br., p. 10) But substantial evidence was presented to the district court contesting these allegations, including evidence that the

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[2] Moreover, waivers, when granted, would permit competing horse shows on the same dates as close as 10 miles apart, not 250 miles, as the Mileage Rate preliminarily fixes.

[3] The Amended Mileage Rule provides, in pertinent part: "with USEF prior approval, the mileage restrictions set forth [above] . . . will not prevent two Hunter/Jumper competitions from being approved if the two competitions have different competition managements, the mileage distance between competitions is at least 10 miles *and the competition with priority gives written permission.*" (USEF Am. Rule 214.7, emphasis supplied) (A.36; USEF Br. At 7; Struzz. Br. 2-3)

lack of competition imposed by the Mileage Rule leads to overcrowding and abuse of the horses and hyper-expensive prices and costs. (R. 317-1/8; 317-4/2 Ex. R; R.335) Respondents also concede that at least until 2006, even under their interpretation of the Mileage Rule, competitions could be held 10—not 250—miles apart on the same dates, at the sole discretion of the incumbent private promoters, completely eliminating any supposed benefit that a mandatory 250-mile separation would confer on horses, riders or the quality of the competition. (USEF Br., p. 6)[4]

Again, while relevant primarily to the veracity of Respondents' position, Petitioners note that USEF has taken substantial liberties, not only with its description of the Eleventh Circuit's opinion and this Court's ruling in *Gordon*, but also with other cases it cites in support of its position. Thus, for example, it cites *Lee v. United States Taekwondo Union*, 331 F. Supp. 2d 1252 (D. Hawaii 2004), for the proposition that the "ASA governed at points of conflict with the Civil Rights Act, 42 U.S.C. § 1981, and that deference to NGB decisions also precludes discrimination claims or remedies therefor that would conflict with sport governance." (USEF Br., p. 28) However, *Lee* in fact holds precisely to the contrary: the court there held that the ASA did not preclude a coach from bringing a race discrimination claim under section 1981.

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[4] USEF's Brief quibbles about whether it was conceded that the Mileage Rule has anti-competitive effects. (USEF Br., p. 17) The fact of the matter is, as stated in the Petition, the contention was never denied below and the district court so assumed in its analysis. (A.46)

CONCLUSION

The Eleventh Circuit unequivocally refused to follow *Billing*, a case in which this Court has granted Certiorari, creating a split in the circuits on the important issue of whether and under what circumstances antitrust immunity will be implied. Thus, it stated: "Regardless of whether *Billing* would require a more searching scrutiny of the Mileage Rule, this Court follows the more closely analogous holdings in *Behagen* and *Eleven Line*." 458 F.3d at 1233. But neither *Behagen* nor *Eleven Line* supports its conclusion that there should be blanket implied immunity from the antitrust laws for all rules promulgated by an NGB, without examination or analysis of the rule's effects and without determining whether the rule is necessary to effectuate congressional intent embodied in the statute, merely because the rule may be within a general category of rules the statute permits the NGB to adopt. The Eleventh Circuit's ruling clearly conflicts not only with *Billing*, now before this Court on Certiorari, but also with *Gordon* and with this Court's seminal decisions in *Silver v. New York Stock Exchange*, 373 U.S. 341, 83 S.Ct. 1242 (1943), and *United States v. Nat'l Ass'n of Securities Dealers*, 422 U.S. 694, 95 S.Ct. 2427 (1975).

For the reasons set forth in Petitioners' Petition for Writ of Certiorari and those set forth in this Reply Brief, Petitioners respectfully pray that this Court issue a Writ of Certiorari and thereafter reverse the judgment of Eleventh Circuit.

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